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# **RESPONSIBILITY AND RESPONSIVENESS:**

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**Final Report  
of the Ontario Task Force  
on Securities Regulation**

**June, 1994**



**RESPONSIBILITY AND RESPONSIVENESS:  
FINAL REPORT OF THE ONTARIO TASK FORCE  
ON SECURITIES REGULATION**

**JUNE, 1994**

AVN-9948

## TASK FORCE ON SECURITIES REGULATION

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## SUMMARY

### Mandate of and Background to the Task Force

The mandate of the Ontario Task Force on Securities Regulation (the "Task Force") was to review, and make recommendations in respect of, the legislative framework for the development of securities policy in the province of Ontario with particular attention to the policy-making role of the Ontario Securities Commission (the OSC).

In particular, the Task Force was struck to assess the implications of, and recommend an appropriate legislative response to, two recent judicial decisions, *Ainsley* and *Pezim*, which raised concerns about the use of policy statements by provincial securities regulators, namely that the instruments were mandatory in character and were thus not properly drafted, developed, and/or applied.

In the course of the Task Force's deliberations, it became clear that the concerns over the use of policy statements applied to some degree to other regulatory instruments used by the OSC, such as Blanket Rulings and Memoranda of Understanding. These subordinate instruments are vitally important to the modern system of regulation; to the extent that uncertainty exists as to the status of some of these instruments, public confidence in the soundness and integrity of the securities regulatory regime in Ontario may be undermined.

In addressing these concerns the Task Force has assumed the desirability of the continuation of the present model of securities regulation in Ontario, and has therefore concentrated on the formulation of recommendations designed to promote the effectiveness of the present system.

### Foundational Principles

The recommendations of the Task Force were predicated on several foundational principles set out below:

- (A) The need for flexibility and responsiveness in securities policy-making and regulation;
- (B) The need to recognize and preserve the strengths of the OSC in the system of securities regulation;
- (C) The need to preserve appropriate political responsibility for the system of securities regulation, building on existing political traditions and institutions;
- (D) The need to promote openness, public participation and certainty in regulation;

- (E) The need to facilitate the efficient administration of the decentralized system of securities regulation; and
- (F) The need to promote the efficient and responsible use of resources in the public sector.

### **Recommended Changes to the Existing Securities Regime**

In accordance with these foundational principles, the Task Force made the following principal recommendations:

- (a) Given the concerns expressed over the inappropriate use of some policy statements by the OSC, and given the value that the appropriate use of such instruments can contribute to the securities system, the Task Force recommended that the Act be amended to confirm expressly the Commission's authority to formulate and apply policy statements so long as they are not properly rules by reason of their mandatory or prohibitory character;
- (b) The Commission should undertake a comprehensive review of the suitability of existing policy statements and other instruments, with a view to determining whether or not, in each case, the instrument is proper in its current form. If the instrument is found to contain mandatory terms, the Commission should determine whether the instrument should be redrafted either as a proper policy statement or as a regulation or a rule. Where the Commission decides that an existing instrument should be redrafted as a policy statement, the resulting instrument should contain general statements of principle or practice; conversely, where the Commission decides that the instrument should be redrafted as a rule, mandatory and prospective terms are appropriate. In either case, public review of the instrument through a prescribed notice and comment procedure may be appropriate;
- (c) The Commission should be required to adhere to a formal statutory notice and comment procedure in respect of policy statements that is relaxed in certain material respects from the regime recommended below for rules;
- (d) One aspect of the overall review discussed in (b) above is that there be recognition of the rule-like character of the Blanket Rulings and Orders. It is recommended that the rule-making power of the Commission (discussed below) include the power to prescribe exemptions from specified requirements of the Act, regulations or rules; this power will replace existing powers under the Act to make blanket rulings and orders. The inclusion of this power is designed to encourage the Commission to rely on explicit and positive statutory authority when making rules rather than on the vagaries of exemption from technical compliance with the Act's terms. It is also designed to ensure that the Commission adhere to the procedural constraints prescribed for rule-making generally. The Task Force further recommended that all existing blanket rulings and orders be converted automatically to rules for a two year period. This sunset period is designed to afford the Commission a reasonable opportunity to redraft the blanket rulings and orders as proper rules and to facilitate their adoption as permanent rules;

(e) The Act should be amended to provide specific authorization to the Commission to enter into non-binding memoranda of understanding with the financial service and securities regulatory authorities of or recognized by the Government of Canada, the territories, other provinces, and governments of other countries, including self-regulatory organizations. The provision will restrict the scope of such agreements to matters relating to the administration and enforcement of the laws administered by the parties to the agreement. In light of the rule like character of MOUs or agreements when applied to registrants or market participants, the Task Force recommended that the Commission not be permitted to use such instruments in respect of such persons or companies. Reliance on the rule-making power, along with attendant procedural safeguards, is to be preferred in such circumstances. However, the Task Force did recommend that Staff be permitted to conclude settlement agreements with market participants and other persons or companies, and that the Commission be permitted to adopt them;

(f) The Commission should devise and implement a process or processes supplementing the section 8 appeal process currently set out in the Act. Such processes should enable market participants to gain timely access to members of the Commission in the event of a material dispute with Staff over the interpretation or application of the Act or subordinate instruments. Among other things, the Task Force recommended that agreements concluded through such a process be transparent;

(g) In view of (i) the costs and efficacy of Cabinet review of all proposed securities regulations, (ii) the securities regulatory expertise of the Commission, (iii) the pace of development and change in the capital market, and (iv) the need to devise workable arrangements to accommodate the anticipated demand for new regulations from the Commission, the Task Force recommended the conferral of a rule-making power on the Commission. Such a power would permit the Commission to adopt rules having the force and effect of law. To promote market certainty, the scope of the rule-making power should be precisely drawn and limited. Such a provision should provide precise support for all existing subordinate instruments except for those few policy statements or subject matters which were deemed by the Task Force to be controversial, i.e., the rules governing related party transactions. The power should also encourage the Commission to petition the Legislature for additional rule-making power in the event that it decides to embark on initiatives outside of the scope of, or in fundamental tension with, the existing regulatory scheme. To achieve these goals, the Task Force recommended the adoption of a statutory provision modelled generally on the existing regulation making provision of the Act: section 143;

(h) The Cabinet should be vested with the right to review Commission rules for the purpose of disapproval. To achieve the integration of existing regulations and rules to be adopted in the future, it was recommended that the Cabinet have the power to designate certain regulations to be rules, and that Cabinet regulations be paramount to rules to the extent of any conflict;

(i) To ensure the accountability and transparency of the recommended rule-making power, the Commission should be required to submit all proposed rules to a formal notice and comment procedure prior to adoption. As part of this notice and comment process, the Commission should be required to publish a statement detailing, among other things, the rationale for the proposed

rule, a qualitative assessment of the costs and benefits of the proposed rule, and a statement of the statutory power upon which the Commission has relied in making the rule. Further, upon the completion of the prescribed notice and comment period, the Commission should be required to publish both a summary of all comments received from the public and a statement by the Commission indicating why certain changes were or were not made to the rule in light of the public comments received. It was also recommended that the Commission be permitted to waive or abridge the notice and comment process in the event of matters of urgency as evidenced by the risk of material harm to investors or the integrity of capital markets; however, such a rule would only be permitted to remain in force for a period of nine months and would require the assent of the Minister before being enacted;

(j) With the exception of blanket rulings and orders (described above), the Task Force recommended that no formal transition arrangements should be devised to elevate automatically existing policy statements to the status of rules or otherwise. This recommendation was based on the Task Force's concern with the nature of public expectations surrounding policies when first adopted by the Commission; the changes required to the drafting of such instruments to render them proper rules or policies; and the maintenance of appropriate incentives for the rapid review and reformulation of these instruments by the Commission. The Task Force recommended that the Commission should implement as soon as possible an appropriate transition regime. To enable the Commission to achieve this recommendation, the Task Force recommended that the Government provide appropriate interim financial assistance to the OSC;

(k) In order to enhance further the transparency, public legitimacy, and effectiveness of OSC policy-making, the Task Force recommended:

- (1) The Commission consider innovative ways of stimulating informed and creative public input in the early stages of securities policy-making;
- (2) The Chair of the Commission be statutorily required to publish a prospective Annual Statement of Priorities and to present such a statement to a standing committee of the Legislature;
- (3) The Commission be statutorily required to publish an annual Regulatory Status Report that would describe the status of certain proposed instruments and identify policies or rules that members of the public requested to be made, amended or rescinded; and
- (4) The Commission entertain submissions continuously from the public respecting the status of its rules and policies;

(l) In order to clarify the mandate and responsibilities of the OSC in fulfilling the purposes of the Act, the adoption of a statutory purposes and principles clause was recommended. The recommended purposes of the Act are the provision of investor protection and the promotion of fair and efficient capital markets. The identified principles included:

the need for effective and responsive regulation,

the importance of the enforcement capability and regulatory expertise of self-regulatory organizations,

the need for responsible harmonization and coordination of securities regimes, and

that business and regulatory costs and other restrictions on the business and investment activities of market participants be proportionate to the regulatory objectives sought to be realized;

(m) In order to enhance the operation of the current regulatory system, the Task Force addressed the interaction between the Commission and the Ministry. The Task Force recognized that a lead role for the Ministry in the day-to-day development of securities regulation would be inimical to the OSC's institutional identity and effectiveness. Nevertheless, the Ministry has a legitimate role in clarifying the Government's objectives in the securities area and in ensuring that the OSC's activities are properly integrated with the activities of other delegated Ontario agencies and ministries whose operations affect capital markets. To promote the effectiveness of the relationship between the Government and the OSC, it was recommended that the range of formal instruments for interaction and communication between the two institutions be expanded. These instruments include:

- (1) Government review of the proposed Annual Statement of Priorities and participation in the notice and comment regime prescribed for specific instruments;
- (2) The statutory adoption of a government power of initiation. Such a power would enable the Government to require the Commission to study or make a rule in respect of a certain matter;
- (3) The creation of an ad hoc working group on financial regulation, which would be vested with the responsibility of coordinating the formation and coordination of Government capital markets policy; and
- (4) The statutory codification of a procedure whereby the Minister would every five years strike a Committee to review and to advise him or her of the legislative needs of the OSC.

(n) The Government should provide appropriate financial assistance to the OSC to implement the Task Force's recommendations, particularly those concerning the transition process. The Task Force noted expressly that the *Ainsley* legacy was not even primarily the responsibility of the current Commissioners and Staff of the OSC; and

(o) Finally, the Task Force addressed the role and responsibilities of the Chair of the Commission in ensuring the Commission's vitality and accountability. The Task Force stated that the Chair has a responsibility to stimulate the broadest possible public participation in policy formation; at the same time, the Chair must ensure the agency's openness and accessibility to public ideas. Only in this way will the regulatory environment necessary for continued dynamic and efficient capital markets be assured.

## I. INTRODUCTION

### A. The Mandate of the Task Force

On October 7, 1993, Ontario Finance Minister Floyd Laughren established a joint Ministry of Finance and Ontario Securities Commission Task Force on Securities Regulation. The mandate of the Task Force was to review, and make recommendations in respect of, the legislative framework for the development of securities policy in the province of Ontario with particular attention to the policy-making role of the Ontario Securities Commission (the "OSC").

In particular, the Task Force was struck to assess the implications of, and recommend an appropriate legislative response to, two recent judicial decisions which raised concerns about the use of policy statements by provincial securities regulators. In *Ainsley Financial Corporation et al. v. Ontario Securities Commission et al.* (1993), 14 O.R. (3d) 280 (General Division), Mr. Justice Blair declared invalid an OSC policy statement respecting the sale of penny stocks in Ontario because the Commission "exceeded its jurisdiction under its enabling legislation in promulgating it." (at p. 306)

In *Re Pezim and Superintendent of Brokers et al. and two other appeals* (1992), 96 D.L.R. (4th) 137 (B.C.C.A.), Mr. Justice Lambert raised questions as to the validity of a policy statement of the British Columbia Securities Commission which purported to mandate certain ongoing disclosure obligations that contradicted standards set out in the provincial securities statute.<sup>1</sup> On appeal to the Supreme Court of Canada, the decision was reversed on the basis that the appellate court had erred in the standard of review it had applied and had thus not demonstrated an appropriate level of curial deference to the expertise of the British Columbia Securities Commission.<sup>2</sup> In the course of analyzing the agency's interpretation of the statute in the context of an adjudicative hearing, Mr. Justice Iacobucci stated that it was the legislature's intention to give "the Commission a very broad discretion to determine what is in the public's interest." (at para. 71) Although he did not directly address the status of the policy statement impugned by Mr. Justice Lambert in the lower court, he cautioned that

it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment. (at para. 75)

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<sup>1</sup> The policy statement discussed by the Court of Appeal was National Policy 40, which deals with the timely disclosure obligations of reporting issuers.

<sup>2</sup> *The Superintendent of Brokers v. Pezim et al.* [1994] S.C.J. No. 58.

## B. Beyond Policy Statements

While the meaning and scope of these decisions are subject to varying interpretations, there is little doubt that, in tandem, they raise fundamental concerns under the existing legislative regime regarding the status and effectiveness of the policy statement as an instrument of securities regulation. These concerns are not confined solely to policy statements. During the course of our deliberations, we found that the concerns respecting the legal status of policy statements applied to some degree to other regulatory instruments used by the OSC such as blanket rulings, notices, principles of interpretation, and communiques.

In sharp contrast to securities statutes and regulations, many of these subordinate instruments, if properly drafted and administered, do not require, nor in practice do they receive, Cabinet or legislative approval before implementation by the OSC. Nevertheless, as we discuss below, it is our view that even if these instruments do not require approval by the elected branch of government, many of these instruments should be submitted to public review through a formal notice and comment regime.

## C. The Role of Subordinate Regulatory Instruments in the Modern System of Securities Regulation

It is essential that the importance of so-called subordinate instruments to the modern system of securities regulation be recognized. The subordinate instruments occupy 63% of the total number of pages in the standard 1994 industry consolidation of securities materials in Ontario, with legislation and regulations comprising the remainder (37%)<sup>3</sup>. Review of the subjects covered by these subordinate instruments underscores their scope and importance. For instance, rules (or "requirements") governing the structure and operation of the mutual fund industry (a \$114 billion industry in Canada in 1993<sup>4</sup>); the nature, form and timing of information that senior issuers must disclose pursuant to the prompt offering qualification system for prospectuses; and the manner in which a related party transaction can be effected (including disclosure, valuation, review, and approval requirements) are entirely or primarily lodged in these instruments.

Moreover, subordinate instruments play an important role in facilitating inter-provincial and international cooperation. There are currently 37 National Policy Statements and

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<sup>3</sup> In the 1994 Carswell's consolidation of the Ontario *Securities Act* [Consolidated Ontario Securities Act and Regulation 1994 with Policy Statements, Blanket Orders and Notices 22nd ed. (Scarborough: Carswell, 1993)], the statute is 83 pages in length, the *Regulation Made Under the Securities Act* (including the forms incorporated by reference into the regulations) another 323 pages, and the remaining instruments a further 677 pages. Specifically, the various Ontario, National, and Uniform policy statements take up 512 pages, blanket rulings and orders 94 pages, and sundry other instruments (notices, intergovernmental agreements, principles of regulation, staff accounting communiqués, and registration clarification notices) 64 pages. The Carswell consolidation does not contain all blanket rulings and notices that have been issued.

<sup>4</sup> The Investment Funds Institute of Canada, Statistical Summary, December 31, 1993.

12 Uniform Act Policy Statements in force. Further, the OSC has entered into memoranda of understanding ("MOU") with other regulatory agencies and governments, such as the enforcement and information sharing memoranda concluded among the OSC and various other Canadian securities commissions and with the United States' Securities and Exchange Commission ("SEC").

To the extent that uncertainty exists as to the status of some of these instruments, public confidence in the soundness and integrity of the securities regulatory regime in Ontario may be undermined.

#### **D. Expertise and Accountability**

In examining the status of these subordinate instruments, the Task Force recognized that it would be required to address certain general issues bearing on the role of a modern administrative agency in a responsible system of government. These issues have been the subject of exhaustive attention in a variety of governmental and quasi-governmental reports and academic articles published in Canada over the past several decades.<sup>5</sup> Most of the discussion has revolved around the desire to exploit the benefits of expertise, efficiency and flexibility flowing from the delegation of authority to specialized regulatory agencies and the tension that this creates within a system that has established broader mechanisms of political accountability and control.

#### **E. Public Participation**

The Task Force encouraged the participation of a broad range of interested parties in our deliberations. Although cost considerations and time pressures did not allow us to hold formal public hearings, we were able to draw on extensive public participation through written comments. In November 1993, we invited the public to respond to a request for comments that set out the mandate of the Task Force, and sought the public's views on several different matters that had bearing on our mandate. A notice of the request for comments was advertised in several Ontario newspapers and the request itself was published in the OSC Bulletin. A copy of the initial Request for Comments appears in Appendix II of this report. As well, at this preliminary stage, the Chair of the Task Force wrote directly to more than 50 different industry and professional organizations inviting their participation.

Despite a relatively short notice and comment period (the "First Round"), we received 33 submissions from a range of individuals and institutions. The submissions received provided considerable assistance to the Task Force in formulating its interim recommendations.

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<sup>5</sup> Canada, House of Commons, Special Committee on Statutory Instruments (Ottawa: Queen's Printer, 1969); Royal Commission Inquiry into Civil Rights, Ontario (Toronto: Queen's Printer, 1971); Report on Independent Administrative Agencies: A Framework for Decision-Making (Ottawa: Law Reform Commission of Canada, 1985); Directions, Review of Ontario Regulatory Agencies (Toronto: Queen's Printer, 1989); Achieving Equality: A Report on Human Rights Reform (Toronto: Queen's Printer, 1992). In the securities context, see: Proposals for a Securities Market Law for Canada (Ottawa: 1979) (Chair: Philip Anisman).

A list of the commentators who filed submissions with the Task Force during the First Round is set out in Appendix III, and a summary of these submissions is provided in Appendix IV.

On February 25, 1994, the Task Force published an interim report. Notice of the publication of the interim report, as well as a further request for comments, was published in the OSC Bulletin. A copy of the notice and the accompanying request for comments is found in Appendix V. Copies of the interim report were distributed to the public through the offices of the OSC and the Ministry of Finance (the "Ministry"). In addition, the Chair of the Task Force sent a copy of the interim report and the request for comments to every individual or organization who had participated in the First Round consultations and to several other interested individuals.

The Task Force received a total of 27 comments on the interim report during the second comment period (the "Second Round"). A list of individuals and organizations who contributed submissions during the Second Round is provided in Appendix VI and a summary of each of these submissions is set out in Appendix VII.

Finally, in the weeks immediately prior to the release of the report, the Chair of the Task Force circulated a draft of the final report (including the draft legislation) to the Staff for review and comment. Despite a short period of review, the Staff responded promptly with a set of detailed and thoughtful comments. The comments received from the Staff were given due consideration by the Task Force.

With these comments, the Task Force is of the view that it has obtained a sufficiently broad and meaningful level of public participation to allow it to conclude its deliberations, the product of which is this final report.

## **F. Acknowledgements**

During the First Round consultations, the Task Force convened three informal sessions with past and present members of both the OSC and the Government of Ontario (the "Government"). During these sessions, we obtained background on the nature of the OSC's relationship with both the Government and the public at large. Participating in these sessions were the current and former Chairs of the Commission (Messrs. James Baillie, Stanley Beck, Peter Dey, John Geller (Vice-Chair), Edward Waitzer, and Robert Wright), a former Director of the Commission (Mr. Joseph Oliver), and current and former officials from the Government (Messrs. Peter Barnes, Bryan Davies and Brad Nixon). The Chair wishes, in particular, to acknowledge the advice and counsel furnished on a number of occasions to the Task Force by two former chairs of the OSC: James Baillie and Stanley Beck.

The Task Force also benefited from discussions with several leading administrative and securities law specialists during various stages of our deliberations: Mr. Philip Anisman, barrister and solicitor, Professors Hudson Janisch and Jeffrey MacIntosh, both of the Faculty of Law, University of Toronto, and Professor Joel Seligman of the University of Michigan Law School. We are particularly grateful to Mr. Anisman and Professor MacIntosh for taking the time

and care to prepare extensive briefs for consideration by the Task Force during both rounds of consultation. Mr. Anisman's submission to us included comprehensive legislative materials which provided assistance to counsel in preparing the legislative materials set out in the appendices. Professor Janisch offered expert advice and guidance to the Task Force throughout our deliberations.

The Task Force received diligent research support from Mr. Ian Freedman, a third year law student at the Faculty of Law, University of Toronto, and administrative support and coordination from Ms. Pia Bruni, administrative assistant at the Faculty of Law, University of Toronto. We also received considerable assistance from staff at both the OSC and the Ministry. Here, we wish to pay special recognition to the support furnished to us by two dedicated and able Staff members of the OSC: Mr. Harvey Tanzer and Ms. Susan Wolburgh-Jenah. We also wish to acknowledge the support of Ms. Dina Palozzi, the Associate Deputy Minister of Finance, and of Messrs. Ed Waitzer and John Geller, the current Chair and vice-Chair, respectively, of the OSC.

Finally, the Task Force is especially appreciative of the assistance provided by Mr. Richard Balfour and Ms. Patricia Koval of the law firm Tory Tory DesLauriers & Binnington. They were responsible for preparing the extensive draft legislative materials embodying the Task Force's recommendations that are set out in the various parts of Appendix I and for offering legal advice during the final stages of our deliberations. Special acknowledgement is required of Mr. Balfour's role in drafting the legislative provisions enumerating the scope of the Commission's and Cabinet's rule and regulation-making authority respectively. We also wish to acknowledge the extraordinary contribution of Mr. Philip Anisman who carefully reviewed the draft legislation under tight time constraints while abroad on vacation.

Ultimately, of course, responsibility for any errors or omissions belongs to members of the Task Force alone.

## **G. Structure of the Report**

The report sets out a series of recommendations and suggestions for changes to the current securities regulatory regime. Recommendations are denoted in the report by the use of *italics*. As well, the Task Force has provided in Appendix I a set of draft legislative materials that express our recommendations in statutory form. Through inclusion of such materials, the Task Force has sought to demonstrate the viability of the approach we have taken in this report and, further, to assist the public's understanding of the nature of our recommendations. To further assist in the realization of these goals, the Task Force has provided a commentary to the draft legislation which elaborates on or clarifies arguments set out in the report. The italicized section numbers that appear throughout the report refer the reader to applicable provisions of the draft legislation contained in Appendix I.

## II. THE ONTARIO SECURITIES COMMISSION

The OSC performs a number of different functions relating to the administration of the province's securities regulatory system. In particular, the OSC is charged with administering the *Ontario Securities Act*<sup>6</sup> (the "Act"), the *Commodity Futures Act*<sup>7</sup>, the *Deposits Regulation Act*<sup>8</sup>, as well as certain provisions of the *Ontario Business Corporations Act*, 1982<sup>9</sup>. The OSC is a Schedule 1 regulatory agency of the Government.

The structure and responsibilities of the OSC are detailed in numerous sections of the Act and in various subordinate instruments. These functions include policy development, administration and enforcement, and adjudication. In contrast to the system of securities regulation operating at the federal level in the United States, the Ontario system combines these various activities in a single agency. As discussed further below, this combination of responsibilities is intentional, and is meant to facilitate a responsive and innovative system of securities regulation. While it is arguable that the risks of bias and internal conflict may be raised through a combination of these responsibilities in a single agency, the Legislature and the Commission have sought to address these concerns by separating the OSC's functions into two parts -- the Commissioners and Staff.

The Commission (often referred to as the "Commissioners") is an autonomous statutory tribunal that is appointed by Order-in-Council and composed of a full-time Chair, two full time Vice-Chairs, and up to ten other Commissioners serving on a part-time basis.<sup>10</sup> The Chair is the Commission's Chief Executive Officer. The Commission formulates policy, sits as an administrative tribunal in hearings, acts as an appeal body from decisions made by the Executive Director and Staff, hears appeals from The Toronto Stock Exchange, and makes recommendations to the Ministry for changes in legislation or regulation. Two members constitute a quorum. The Commission holds regular policy meetings and also convenes panels for administrative hearings.

The second part of the OSC is referred to as the Staff, and is composed of more than 200 lawyers, accountants, investigators, managers and support staff serving the day to day needs of the Commission. The Executive Director is the OSC's Chief Operating and Administrative Officer and is responsible for Staff and for the activities of the various operating departments of the OSC: the Offices of the Chief Accountant, the General Counsel, and the Chief

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<sup>6</sup> R.S.O. 1990, c.S.5, as amended by S.O. 1992, c.18, s.56.

<sup>7</sup> R.S.O. 1990, c.C.20.

<sup>8</sup> R.S.O. 1990, c.D.8.

<sup>9</sup> R.S.O. 1990, c.B.16.

<sup>10</sup> This discussion is taken in part from the Ontario Securities Commission's 1991 Annual Report, pp 6-7.

of Compliance, and the Corporate Finance, Capital Markets, International Markets, and Enforcement branches, and Administrative and Systems Services.

We recognize that the effectiveness of this combined securities regulation model was recently addressed in the Report of the Vancouver Stock Exchange & Securities Regulation Commission, chaired by Mr. James Matkin.<sup>11</sup> That report concluded that the functioning of the British Columbia Securities Commission could be enhanced by devolving the agency's existing policy-making and adjudicative roles onto formally separate institutions.

Although we were invited by a few members of the public to consider the suitability for Ontario of this model, or a variant on it, we have concluded that the issue is not within the mandate conferred on us by the Minister. Instead, we have assumed the desirability and continuation of the combined model for Ontario, and have concentrated on the formulation of recommendations that promote its effectiveness in securing the integrity and efficient operation of Ontario capital markets.

### **III. FOUNDATIONAL PRINCIPLES**

In Part IV, we enumerate our specific recommendations for securities policy-making in Ontario. These recommendations are predicated on several foundational principles set out below. Through the identification of foundational principles which underlie our specific recommendations, it is hoped that readers who may disagree with our recommendations can determine whether such disagreement is the result of the principles we have chosen or a mistaken application of these principles to matters within our mandate.

The principles which underlie our recommendations are as follows:

#### **A. The need for flexibility and responsiveness in securities policy-making and regulation.**

In crafting our recommendations, we have endeavoured to devise institutional arrangements that promote regulatory responsiveness and flexibility. We believe that the vitality of a given capital market is strengthened by the capacity of its regulators to respond to market trends and changes in a timely, creative and flexible manner. To the extent that outdated or rigid regulation is permitted to remain in force, community respect for the regulatory regime will diminish. Further, such regulation imposes burdensome costs on investors and issuers alike that may fuel the flight of capital to more congenial regulatory environments.

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<sup>11</sup> Restructuring for the Future: Towards A Fairer Venture Market, The Report of the Vancouver Stock Exchange & Securities Regulation Commission, January, 1994.

**B. The need to recognize and preserve the strengths of the OSC in the system of securities regulation.**

In framing our recommendations, we have sought to recognize and preserve the OSC's institutional strengths.

By any standard, the OSC has played a principal role and enjoyed considerable success in the administration of an efficient securities regulatory system for Ontario. The OSC is recognized as the leading securities regulatory authority in Canada and has earned respect internationally for its role in the regulation of an efficient, liquid and competitive capital market.

Three principal factors account for the OSC's success. First is the quality of both the Commissioners and the Staff. The OSC's personnel are a highly conscientious, skilled and expert group. Many possess advanced professional degrees and have had considerable private sector experience before joining the agency.

A second factor underlying the OSC's success is the experience and understanding of capital markets that it derives from enforcement of the Act. Through case-by-case enforcement and adjudication, the OSC has developed ample knowledge of the operation of capital markets, the role and integrity of capital market participants and, more generally, the possibilities and limits of regulation. The breadth of the specialized expertise of Canadian securities regulatory agencies was recently acknowledged by the Supreme Court in the *Pezim* decision.

As the distinguished American administrative law scholar Kenneth Culp Davis has observed, when legislatures delegate statutory authority to agencies, they are only able to identify general problems, suggest broad solutions, and then hope that the agency will shape the statute's broad terms to specific circumstances.

Then the delegate, through case-to-case consideration, where the human mind is often at its best, nibbles at the problem and finds little solutions for each little bite of the big problem. Creativeness in the nibbling sometimes opens the way for perspective thinking about the whole big problem, and large solutions sometimes emerge.<sup>12</sup>

The third factor in the OSC's success is independence from special interest or partisan political influences in respect of its quasi-judicative functions. Much of the literature and many of the studies on the role of the modern administrative agency and tribunal acknowledge that one of the single most important standards of conduct applicable to the

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<sup>12</sup> K.C. Davis, Discretionary Justice: A Preliminary Inquiry (Baton Rouge, LA.: Louisiana State University Press, 1969) at 20.

operation of any securities commission insofar as its quasi-adjudicative function is concerned is independence.<sup>13</sup>

**C. The need to preserve appropriate political responsibility for the system of securities regulation, building on existing political traditions and institutions.**

Our recognition of the value of independent, non-partisan securities regulation should not be interpreted to detract from the legitimate role of the Minister, Cabinet and the Legislature in the securities regulatory system, especially on matters which are related to broader public policy questions. Our view is that the quality and integrity of the securities regulatory regime is strengthened by strong, but restrained, public policy oversight.<sup>14</sup> When appropriately applied, such oversight complements the technical expertise of the OSC, and ensures that securities policy is compatible with a broader range of public policies and priorities for which the Government is responsible.

In Ontario, political oversight of securities regulation is achieved through the accountability of the OSC to the Cabinet and Legislature through the Minister of Finance (the "Minister"). A fundamental tenet of this system is that the Minister is ultimately responsible for overseeing the overall operation of the securities regulatory regime. Although ministers vested with the responsibility for the OSC have historically, by and large, chosen to endorse the OSC's recommendations on securities regulatory matters, this fact should not obscure the Minister's or Cabinet's ultimate prerogative to adopt an approach different from that recommended by the OSC. The Minister's role in the recent adoption of regulatory changes to executive compensation disclosure requirements is a case in point.

We note that the Canadian system of ministerial oversight contrasts sharply with the structure of accountability for regulatory agencies that exists in the United States. In the American system of government, the executive and legislative branches of government are separate and discrete, generating greater formal independence for delegated agencies. In our system of government, the independent status of agencies is less the product of constitutional structures of government than a pragmatic recognition of the benefits to be derived from remitting certain tasks to an expert agency.

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<sup>13</sup> Hudson Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979) 17 Osgoode Hall L.J. 46; "The Role of the Independent Regulatory Agency in Canada" (1978) 27 U. New Brunswick L.J. 83.

<sup>14</sup> A balancing of independence and accountability is prerequisite to an authoritative and credible regulatory regime. See: A.J. Roman, "Independence and Accountability of Administrative Tribunals: A Delicate Balance", Cdn. Bar Assoc. Continuing Legal Education, August 1993. See also: Margot D. Priest, "Structure and Accountability of Administrative Agencies", in Special Lectures of the Law Society of Upper Canada (Carswell: Toronto, 1993) 49.

In our recommendations, we have sought to devise modifications to the existing system that attempt to balance increased regulatory authority with increased public accountability within the framework of our existing political institutions and traditions.

**D. The need to promote openness, public participation and certainty in regulation.**

We have already emphasized the need for independent yet accountable securities regulatory institutions capable of accommodating and responding to market trends and ongoing changes in the capital markets. Yet, responsiveness, flexibility, independence and accountability do not alone make for a legitimate regulatory regime. An equally important characteristic of a legitimate regulatory system is its congruence with the Rule of Law.

In his First Round submission to the Task Force, Professor Jeffrey MacIntosh stated that the

classic expression of the Rule of Law amounts at bottom to a statement about how law in a representative democracy differs from the arbitrary law of potentates. In a representative democracy, law derives legitimacy only to the extent that it emanates from the democratic institutions of the polity, and only insofar as those who exercise authority are acting within the sphere of authority properly delegated to them by the legislature. (at 17-18)

In this report, we do not attempt to resolve the issue of how best to rationalize broad delegations of power to subordinate agencies with the concept of the Rule of Law. We recognize that this issue is subject to vigorous, ongoing debate. Instead, we acknowledge the importance of the values of openness, public participation and certainty, all of which are associated with the Rule of Law. In particular, we emphasize the importance of creating institutional arrangements in the securities regulation context that ensure widespread and equal access by members of the public to timely information respecting the policies and practices of the OSC.

**E. The need to facilitate the efficient administration of the decentralized system of securities regulation.**

In our recommendations we have tried to preserve Ontario's capacity to enter into workable *ad hoc* arrangements for harmonizing provincial and international securities regulation. We have also sought to support the OSC's leadership role in both the domestic and international contexts.

As in so many other areas of Canadian public policy, the impact of federal distribution of power arrangements on the nature and delivery of securities policy-making has been the subject of considerable attention. Many commentators have criticized the current

decentralized delivery of securities regulation, and have called for the formation of a national securities commission.

We do not think that it is within the mandate of the Task Force to contribute to the discussion and debate regarding federalism in securities regulation. Instead, we have focused on making recommendations which can be integrated effectively into the system that is in place today. In this respect, the demonstrated capacity of the provinces and the territories to resolve some of the more costly features of the decentralized distribution of powers through the use of formal and informal arrangements is notable. The most important of these arrangements is the Canadian Securities Administrators ("CSA"). The OSC has historically played a central role in initiating, supporting and guiding key initiatives of the CSA which promote the harmonization of administration of provincial systems of regulation into a more uniform national system of regulation.

Our recommendations are intended to facilitate the efficient administration of the decentralized securities regulatory regime in Canada.

**F. The need to promote the efficient and responsible use of resources in the public sector.**

We have sought to ensure that the recommendations we propose make efficient use of existing public sector resources. We have deliberately eschewed those institutional arrangements which would increase the likelihood of waste and duplication in the delivery of securities regulation. Instead we have opted for arrangements that are conducive to decentralized, responsive decision-making within a system that requires accountability and oversight. This should not be interpreted to suggest that there are no resource implications to the recommendations in this report. We discuss this issue separately in Part IV.H of this report.

## **IV. THE AGENDA FOR CHANGE**

In this part, we set out our proposed changes. We should note at the outset that most commentators are of the view that the present regulatory structure works fairly well. As Mr. William Moull stated in his First Round submission to the Task Force: "The first point, and to me the foremost, is that the present regulatory structure works fairly well, no matter how ungainly and fragmentary it may appear to some" (at 1). We strongly concur in this view.

**A. The Value of Different Regulatory Instruments in a Modern System of Securities Regulation.**

**(i) Diversity of Instruments**

The Task Force endorses the OSC's use of a broad range of instruments in policy development and regulation. A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable

parts of a mature and sophisticated regulatory system. However, we believe that there has not always been a clear understanding of the appropriate role for each of these regulatory tools.<sup>15</sup> Nor do we believe that there has been a consistent use of mechanisms for public review. In this report, we make recommendations designed to maximize the appropriate use and effectiveness of these instruments and, as well, to ensure that the procedural and substantive restrictions are appropriate for each.

Having stated that there is value in diversity, it is the view of the Task Force that the present securities regime should be simplified by reducing the number of policy instruments having the same or similar function. To Task Force members, a simplification of the structure of the securities regime would assist the public's understanding of the regime.

## **(ii) Policy Statements**

### **(a) General Role**

As mentioned earlier, certain judicial challenges to the status of policy statements served as the immediate impetus for the Task Force's mandate. Currently, the Commission's jurisdiction to issue policy statements has its basis in administrative law principles which recognize the regulatory tribunal's use of policy as a legitimate means of informing the public of the manner in which it may exercise its statutory discretion when deciding individual cases.<sup>16</sup>

Discretionary authority of the Commission resides in such provisions as its authority to suspend, cancel, restrict or impose terms and conditions on registration; to rule that any trade or security or any person or company is not subject to the prospectus or registration requirements under the Act; to order that trading in securities shall cease; and to order that any or all of the registration, prospectus, or take-over bid exemptions under the Act not be available, where in its opinion such action is in the public interest.<sup>17</sup>

From a practical standpoint, policy statements can be a very potent regulatory instrument. An issuer may find, for example, that violation of the terms of a policy statement could serve as a basis for a discretionary decision by the Director to deny a prospectus receipt - a decision which, in the time sensitive environment of capital markets, could have a serious

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<sup>15</sup> This point is given elegant elaboration in Hudson Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rulemaking", Special Lectures of the Law Society of Upper Canada (1992), Chapter D.

<sup>16</sup> Report on Independent Administrative Agencies: A Framework for Decision Making, *supra* note 3, at 29-31; H. Molot, "The Self-Created Role of Policy and Other Ways of Exercising Administrative Discretion, (1972) 18 McGill L.J. 310; *Capital Cities Communications Inc. et al. and Canadian Radio-Television Commission et al.* [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609.

<sup>17</sup> See: the Act, ss.27, 74, 104, 127 and 128. See also *Regulation Made under the Securities Act* R.R.O. 1990, Regulation 1015, s.105.

adverse effect on its business. Similarly, on the basis of a policy statement and its discretionary application in a given hearing, the Commission could withdraw the registration of a market participant, thereby jeopardizing his or her livelihood.

Policy statements have several benefits in the securities context, which include:<sup>18</sup>

- (i) the creation of a consistent and coherent approach to issues within the Commission's investor protection and capital market efficiency mandate on the basis of which constituents can proceed with some certainty. When properly drafted and applied, policy instruments assist in lending some definition to the Commission's otherwise undefined discretionary authority, reducing for market participants some of the uncertainty surrounding the regulatory ramifications that may flow from certain market practices. While the policy statement may guide the Commission as well as market participants, it cannot preclude the Commission from exercising discretion on a case by case basis;
- (ii) they allow the regulator to deal with an issue comprehensively and actively, in contrast to adjudication which is limited to the facts of a specific case;
- (iii) they afford constituents at large to inform policy development through comment invited by the agency;
- (iv) they permit flexibility in application and administration. Unlike legislation, policy statements do not have the force of law. Policy statements therefore allow for greater scope in the exercise of judgment by constituents affected by the policy and less need for the involvement of securities regulators where technical "non-compliance" does not offend underlying policy objectives or give rise to public interest concerns which the policy statement was intended to address. In this manner, market participants can raise or conform the standards of their practices in response to published policy statements, obviating the need for rigid rules or costly and disruptive regulatory intervention;
- (v) they provide clear guidance to the tribunal's staff on the kinds of conduct or circumstances that should generally attract staff recommendations for enforcement proceedings; and

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<sup>18</sup> However, several of these benefits can also be realized through use of other subordinate instruments.

- (vi) they facilitate national and international regulatory co-operation and administration.<sup>19</sup>

Having recognized that policy statements have an appropriate and necessary role to play in the regulatory system, we note concern with the way in which the Commission has sometimes utilized these instruments. For instance, in his First Round submission to the Task Force, former Commission Chair James Baillie stated that:

OSC staff are wont to treat policy statements as equivalent to legislation. There is some flexibility, within narrow parameters, in the administration of Policy 9.1; with that exception, most of the policies are administered with little flexibility or discretion. (at 6-7)

Some of the comments we received were even more pointed. For instance, in its First Round brief to the Task Force, Canada Trust stated:

It is our view that (the Commission's) policies are a thinly veiled attempt to enact legislation by means offensive to a democratic society. The state legislates either by statute or regulation under the statute and not by pronouncements enacted by well-meaning groups of bureaucrats. (at 1)

These concerns were at the heart of Mr. Justice Blair's decision in the *Ainsley* case. In that case, the Court rejected the OSC's argument that draft policy statement 1.10, which purported to regulate sale practices respecting penny stocks in Ontario was valid because it was a mere guideline. Instead, the Court held that the policy was regulatory and mandatory in character:

it is clear that a failure to meet the "expectations" of the policy will attract disciplinary procedures under the Act, or at least carries with it the threat or intimation of such proceedings. Neither those whose activities in the securities industry are the object of the policy, nor their advisors, are likely to lose sight of the reality of the situation. The mere existence of such a state of affairs is a very effective weapon in the regulator's arsenal, of course. (14 O.R.(3d) 297-298)

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<sup>19</sup> As the Investment Funds Institute of Canada stated in its First Round submission to the Task Force: "We submit, given the current resource constraints of the various securities regulatory agencies in Canada and the relative lack of priority given by the provincial legislatures and cabinets to securities regulation, that requiring all regulation to be embodied in the statutes or regulations of each jurisdiction would result in an unworkable regime that is wholly unsuitable to the changing needs of a vibrant marketplace." (at 4)

In specifying mandatory or regulatory requirements through the policy statement, the Court found that the OSC had usurped the power of the Lieutenant Governor in Council to make regulations as expressly provided for in the Act.

We understand that the *Ainsley* decision is currently under appeal, and that the Court's disposition of that case may be subject to correction. Whatever the outcome of that appeal, it is the view of the Task Force that as a matter of sound public policy, policy instruments that are mandatory or prohibitory in character should not be permitted to remain in their current form.

Although we did not undertake a comprehensive review of existing policy statements, during the course of our deliberations, several examples were furnished to us of policy statements which have been used by the OSC to prescribe mandatory codes of conduct. In some cases, the policy statement contains a comprehensive set of requirements. OSC Policy 5.10 which governs the Annual Information Form and Management's Discussion and Analysis of Financial Condition and Results of Operations was cited to us as an example of such a statement.

However, while some of the policies are purely regulatory in character, many involve an amalgam of different elements, which typically include broad statements of principle and narrow, quite detailed codes of conduct. OSC Policy 9.1 governing Disclosure, Valuation, Review and Approval Requirements and Recommendations for Insider Bids, Issuer Bids, Going Private Transactions, and Related Party Transactions was cited as an example of a hybrid policy statement. Although the great bulk of the policy sets out mandatory elements, the instrument is punctuated with broad statements of principle. The latter attempt to confer some limited scope on market participants to adjust their behaviour to specific circumstances so as to meet the Commission's underlying public policy concerns.

We focus on these two statements to underscore the magnitude of the needed adjustments to the existing regulatory regime. In our interim report, we endorsed the Commission's recent statement that "its policy statements, communiques and notices should be considered as useful guides to the circumstances in which the Commission might exercise its discretion in the public interest under the specific provisions of the Act that grant such discretion"<sup>20</sup>.

Nevertheless, we are aware that the form of many policy statements affords little room for discretionary judgment. Even in the case of "hybrid" policy statements, there may be considerable difficulty in determining which mandatory elements should be applied or complied with on the basis of stated principles. As the law firm of Fasken Campbell Godfrey stated in its Second Round submission in relation to transition issues:

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<sup>20</sup> News Release, (1993), 16 OSCB 4054.

many of the policy statements which the Commission proposes be elevated to the status of rules ... are not framed as rules or regulations. They contain lengthy discussions of objectives, intentions and goals, and are not, generally, drafted in a manner which would permit those affected thereby to know whether they are acting in compliance with the requirements of those policies, if indeed what is required by such policies is in fact, capable of determination with certainty (at 5-6).

Another notable feature of policy statements as currently drafted is the relative dearth of explicit statutory subject matter support. Typically, policy statements are founded on the Act's discretionary powers, which leave scope to regulators to define the appropriate content of policy statements. This point is implicitly acknowledged in the common characterization of several of the central policy statements as "independent regimes". As in our interim report, we have declined to consider expressly the substantive scope of the Commission's authority to make policy statements. We do, however, believe that while limited statutory direction respecting the precise nature of subject matter jurisdiction may be appropriate for policy statements if drafted and enforced as guidelines, it is an inadequate foundation upon which to create mandatory rules.

Public attention to the mandatory character of policy statements is understandable. If policy statements have mandatory effects, then the Commission should be required to respect the procedures and substantive constraints appropriate for law making. In the case of legislation and regulations, this means direct oversight by representatives of the elected branch of government. These heightened procedural requirements are an essential component of the regulatory system; they are the mechanism through which exercises of public power are submitted to effective public control.

In stressing this point, we do not mean to impugn the legitimacy of the Commission's involvement in the vast majority of subject matters now covered by policy statements. We regard the areas addressed in the existing policy statements as the natural focus of a mature securities regulatory system. Our central concern is that the OSC pursue its regulatory objectives in a manner which ensures proper deliberation, debate, and accountability and that is consistent with the statute and with administrative law principles.

#### **(b) Recommendations for Statutory Conferral of Policy-Making Authority**

The Task Force regards the responsible exercise of discretion as essential to the attainment of an effective, accountable securities regulatory regime. Based on our reading of the Supreme Court of Canada decision in *Capital Cities Communications Inc. et al. and Canadian Radio-Television Commission et al.* (1977), 81 D.L.R. (3d) 609 (S.C.C.), we believe that the absence of specific statutory authorization for policy statements is not fatal to the legitimate use of this instrument by the Commission. *Nonetheless, given the importance of the policy statement in the securities system, we recommend that the Act be amended to confirm expressly the Commission's authority to formulate and apply policy statements.*

In our interim report, we provided a relatively concise definition of the policy statement for inclusion in the statute. In their Second Round submission to the Task Force, Professors Condon and Evans of Osgoode Hall Law School urged us to clarify and elaborate on the definition and role of policy statements.

We recommend the following section be added to the Act:

*"For the purposes of this Act a policy is a statement:*

- (a) of the principles, standards, criteria or factors that will influence a decision or exercise of discretionary authority by the Commission or the Director under the Act, the regulations or the rules;*
- (b) as to the manner in which a provision of this Act, the regulations or the rules is interpreted or applied by the Commission or the Director; or*
- (c) of the practices generally followed by the Commission or the Director in the performance of duties and responsibilities under this Act. (s.143d(1))*

*For greater certainty, we recommend that the Act should stipulate that policy statements do not have the force of law (s.143d(11)) and, further, should not properly be a rule (s.143d(4)).*

*When applying policy statements to individual cases, the Commission is bound to consider the exceptional.<sup>21</sup> Conversely, where, as the result of experience in case-by-case enforcement and adjudication, the Commission's thinking in respect of a specific area has crystallized, the Commission must consider the suitability of using other instruments, namely rules and regulations, to implement securities policy. We discuss the need for statutory rule-making authority, as well as its accompanying constraints, in Part IV.B below.*

*We further recommend that policy statements be formulated and the Commission's statutory discretionary authority be exercised pursuant to the purposes and principles of the Act. For greater certainty, we recommend in Part IV.E an express statement of the Act's purposes and principles.*

*We also recommend that the Commission undertake a full review of its policy statements and other policy instruments (namely notes, notices, communiqués, and bulletins) with a view to determining whether or not, in each case, the instrument is a proper policy statement. If so, then there is no further need for action. However, if the instrument contains mandatory*

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<sup>21</sup> As Mr. Justice Craig stated in the case of *Gordon Capital Corp v. Ontario (Securities Commission)* (1991), 1 Admin. L.R. (2d) 199 (Ont. Div. Ct.): "It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest..." (at 211).

*terms, the Commission should determine whether the statement should be redrafted either as a proper policy statement or as a regulation or rule.*

*Where the Commission decides that an existing instrument should be redrafted as a policy statement, the resulting instrument should contain general statements of principle or practice, and should not include mandatory and comprehensive codes of conduct. Conversely, where the Commission decides that an instrument should be redrafted as a regulation or a rule, mandatory and prospective terms are appropriate, but generalized statements of principle are not. In either case, once redrafted, the revised instrument should be remitted to an appropriate notice and comment regime so as to ensure proper public review and analysis of the approach set out. We note that even as general guidelines, policy statements can address fairly specific issues. We also note, as discussed further below, that regulations and rules can be drafted so as to permit exemptive relief from their terms. (s.143(6))*

The Task Force acknowledges the significant resource implications of such an exercise and the length of time it may take to complete the review. Nonetheless, it is our view that the defects inherent in some policy instruments require significant reformulation. This is discussed in more detail in Part IV. C(vi).

*The Task Force acknowledges the national and international implications of many of the more significant policy statements. In this respect, we recommend the adoption of a statutory provision that would confirm the Commission's powers to make policy statements in concert with other domestic regulatory agencies. (s.143d(3)) Nevertheless, our commitment to interprovincial harmonization ultimately must yield to fundamental concerns of legal authority. We are thus unable to countenance the inappropriate use of policy statements to support harmonized regulatory regimes. Although no doubt presenting difficult transition issues, we remain confident that workable, as well as legitimate, arrangements for jurisdictional coordination can be readily achieved.*

We recognize that the pace of change in capital markets, combined with the reality of decentralized securities regulation, will almost of necessity require that some portion of the regulatory regime will consist of policy instruments that lack the force of law. However, so long as these instruments are not mandatory, we find this to be appropriate.

### **(c) *Ultra Vires* Policy Statements**

Some of the submissions we received focused on the issue of *ultra vires* policy statements, namely, the specific safeguards that should be applied to certain policy statements that are outside the apparent statutory framework of the Act. In our view, given our legal system, to the extent that a Commission policy statement is outside the scope of the statute, its status is unambiguous -- it is, by definition, of no force or effect, either by itself or in relation to the putative exercise of a public interest power.

From the submissions we received that discussed the issue of *ultra vires* policy statements, it is clear that some hold the view that the Legislature has not demonstrated a sufficient level of interest in or commitment to the securities area. Some members of the public are of the view that extra-legislative mechanisms (such as Cabinet review) could be used to validate policy statements that are allegedly outside the statute. The pervasiveness of this view underscores the need for enhanced legislative involvement in the securities area. This is a point to which we return later in the report.

#### **(d) Notice and Comment**

In our interim report, we considered the suitability of requiring the Commission to adhere to a statutorily prescribed notice and comment procedure in the development of policy statements. The argument for subjecting the policy statement to a formalized statutory notice and comment obligation is based on the value of broad public consultation in the development of policy, the Commission's past reliance on notice and comment review in the formulation of policy statements, and on the historic difficulties that the public and the Commission have had in distinguishing policy instruments from rules.

The argument against requiring adherence to the notice and comment regime is that if the OSC refrains from relying on policy statements as an instrument for *de facto* rule-making, then the need for a formal statutory scheme for notice and comment is attenuated. The concern is that if the regulatory agency subject to these procedural obligations perceives them to be costly or cumbersome, then it will simply refrain from the expeditious articulation of policy. In this way, the statutory notice and comment requirement which is meant to promote public transparency and deliberation may have unintended and perverse effects. Instead of teasing out helpful agency guidance, onerous procedural obligations may actually have the effect of inhibiting the agency's willingness to expose its day-to-day practices to the public.

In our interim report, we recommended against the adoption of a prescribed notice and comment procedure for policy statements. It was our impression that the costs of this process would exceed the benefits to be realized. We also expected that the OSC would, in light of our recommendations, adopt a variant on the procedure we prescribe below for rules. Finally, it was our hope that by restricting the statutory notice and comment procedure to rules, the distinctive status of rules would be underscored.

In the comments we received, however, there was widespread concern with this recommendation. Given that many commentators expect that policy statements will continue to play an enduring and important role in the securities law regime, they were anxious that we ensure an appropriate and formalized set of procedural safeguards for that power. This argument is buttressed by the Commission's central role in and responsibility for the securities regulation system. Given the significance of its role, the Commission's articulation of policy, as defined above, should be subject to the public debate and deliberation that is facilitated through a formalized notice and comment regime.

*We recommend the statutory adoption of a notice and comment obligation for the Commission in respect of policy statements. (s.143d(5)(6)) Yet, in recognition of the concerns respecting the potential costs of this procedure, we recommend that the notice and comment process for policy statements be relaxed in certain material respects from the one we recommend for rules in Part IV.C. In particular, we recommend that the Commission be required to provide the public with a minimum 60 day comment period, which is 30 days shorter than the minimum period we prescribe for rules. Further, as policy statements would be based on powers that are within the Commission's or Director's exclusive statutory competence, there would be no need to involve the Cabinet in the development of these instruments. Hence, following formal adoption by the Commission, policy statements would become effective upon official notice being published in the OSC Bulletin.*

### **(e) Other Staff Policy Instruments**

We are aware that the OSC uses a variety of means to inform the public as to its perspective on matters of interpretation or the procedural and administrative practices of the securities regulatory system. When published in the OSC Bulletin, these less formal statements provide valuable information to the public as to the way in which the securities system is being or may be administered in the future. As a consequence, the need for affected parties to contact OSC personnel in order to understand how Staff practices under the securities regime will impact on their interests in particular circumstances is attenuated. In this manner, the climate for business planning is rendered more certain.

In prescribing a legislative regime for Commission policy statements, we have no expectation that the role for these other instruments will diminish. Under the regime that we are proposing, it is possible that Staff, through the Director, could make policies which would not be adopted by the Commission, and hence not require adherence to the prescribed notice and comment procedure. In this way, the OSC would have considerable latitude in determining whether a Staff policy should be remitted to notice and comment. However, a failure to invoke the prescribed regime would mean that the policy could not be adopted by the Commission.

In the end, the decision as to when a statement of the Staff is sufficiently "ripe" to be submitted to formal review through the prescribed regime for policy statements is a question of judgment that belongs to the OSC. In this respect, we would expect that the degree of confidence that the Commission has in Staff's position, the significance of the issue under consideration, and the nature of the guidance being given, would be the salient factors in determining whether or not to adopt formally a policy statement. Of course, we note that certain matters now addressed through some policy instruments, i.e., statements of general information or of sound or recommended practices of conduct, are outside the definition of policy, and therefore do not even presumptively trigger the notice and comment obligation.

We note the concern expressed by some regarding the nature and degree of public access to the OSC's views as articulated in speeches and other practices. In their Second Round submission, the law firm of Smith, Lyons, Torrance, Stevenson & Mayer stated:

We are...concerned about the ... use of speeches in advising market participants and their advisors of Commission policies. Our concern is that all market participants and their advisors have equal access to information. In the past, we respectfully submit that this has not always been the case, resulting in an unlevel playing field, thereby eroding confidence and creating uncertainty and accompanying frustration for market participants. (at 1-2)

To address concerns of timely access to such information, the Task Force endorses the expeditious publication of such speeches and other similar statements by Commissioners and Staff in the OSC Bulletin.

Finally, we endorse the frequent articulation and publication of actual practices in particular areas by the OSC's Staff. The annual publication of decisions made by the Executive Director under OSC Policy 9.1 constitutes a useful illustration of this practice. However, for sake of economy, we encourage the Staff to consider the circumstances and the form in which this information will be most helpful to market participants. We endorse the suggestion of the Canadian Bankers Association that some Staff decisions, like exemptions, be published "where the granting of an exemption reflects a significant change from published policy or previous practice."<sup>22</sup>

### (iii) **Blanket Rulings and Orders**

Blanket rulings and orders have been issued by the Commission under various statutory exemption powers.<sup>23</sup> Based on these powers, the Commission has, in cases in which it has considerable regulatory expertise, exempted classes of trades, securities, issuers and other matters from regulatory requirements otherwise applicable, provided, certain conditions or terms are met. In this way, blanket rulings and orders permit parties to avoid the costs occasioned by delay and uncertainty when required to file individual applications for relief. As well, these instruments permit the Commission to make efficient use of its resources.

The exemption power has been utilized to support a broad range of regulatory initiatives. In some cases, such as the ruling governing Eurosecurity Financings,<sup>24</sup> the blanket

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<sup>22</sup> Canadian Bankers Association, Second Round Submission, at 8. According to the CBA, "publication of the exemption would be beneficial: industry participants would know that a policy change had been made and would not have to rely on rumours."

<sup>23</sup> For example, see section 74 (prospectus and registration requirements), section 80(b), section 113, section 118(3), and section 121(2) of the Act.

<sup>24</sup> *In the Matter of Eurosecurity Financings*, ruling dated November 22, 1984; (1984) 7 OSCB 4897. The ruling permits certain eligible investors to participate in the Eurosecurity market without first requiring the issuer to obtain a prospectus receipt or invoke the private placement exemption, provided a brief undertaking is signed respecting future trading activities.

ruling deals with a discrete issue or subject matter, and contains all of the terms and conditions of the ruling within the form of the ruling itself. In other cases, however, the blanket ruling supports a more elaborate set of conditions that are enumerated in an accompanying policy statement. The multi-jurisdictional disclosure regime concluded between the OSC and the American Securities and Exchange Commission is one such statement. It is based on two blanket exemption orders, which, in turn, support a lengthy policy statement -- National Policy No. 45 - that specifies conditions for eligibility.<sup>25</sup>

As is clear from the subject matter of these regulatory initiatives, many of the blanket rulings and orders implement policies that constitute an essential part of the regulatory system in a rapidly changing marketplace. While recognizing the importance of these instruments, and acknowledging the strong arguments which have been made in favour of their legitimacy, the Task Force is aware that some commentators have questioned the statutory validity of these instruments. The Task Force has explored a number of alternative means for resolving this issue through legislative clarification.

The Task Force considers that if, as we recommend below, a rule making power is conferred on the Commission, there may be little need for the OSC to continue to use the blanket ruling in its present form. As discussed in more detail below, the rule-making power envisioned by the Task Force would provide the Commission with the ability, among other things, to make exempting rules analogous to the existing blanket rulings.

Replacing the blanket ruling instrument with exempting rules would have the benefit of simplifying the regime through the reduction of the number of regulatory instruments used. Most significantly, however, the resulting exempting rules would be subject to the notice and comment requirements and the cabinet disapproval period that we recommend for rules generally -- requirements that the OSC is not statutorily bound to adhere to presently. On a going forward basis, we regard these procedural protections as appropriate and necessary given the rule like character of the blanket rulings and orders.

We also note that by including exempting rules within the general rule-making power, the Commission would be encouraged to invoke positive authority to regulate in an enumerated area rather than relying on the vagaries of exemptive relief from technical compliance with the Act's broad terms. By so doing, the nexus between the terms of the statute and the content of the subordinate rules would be significantly heightened. For example, the rules in the mutual fund area, several of which are now supported by blanket rulings, would be based on explicit positive authority, such as that which we have stipulated in paragraph 30 of redrafted section 143(1) of the proposed legislation.

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<sup>25</sup> *In the Matter of the Multijurisdictional Disclosure System*, ruling and order dated June 24, 1991 under the Ontario Securities Act; (1991), 14 OSCB 2863; and *In the Matter of the Multijurisdictional Disclosure System*, exemption dated June 24, 1991 under the Ontario Business Corporate Act; (1991), 14 OSCB 2867.

However, while we encourage the Commission to rely on positive authority for rules, we recognize that the Commission will continue to use exempting rules where they do not support independent regulatory regimes. For example, the blanket rulings currently made in respect of prospectuses and registration are of this character.

We further anticipate that the Commission would invoke the specified exempting powers to support rules otherwise made under the Act. It is contemplated and viewed as uncontroversial by the Task Force that multiple paragraphs in the rule-making power could be used to support the authorization of a given rule. For example, to the extent that mutual fund rules could only be implemented by securing relief from the Act's prospectus requirements, we would regard this as an appropriate use of the exemption powers set out in the rule-making section.

*The Task Force recommends that the rule-making authority of the Commission include the power to prescribe exemptions from specified requirements of the Act, regulations or rules, subject to terms and conditions. (s.143(7)) In the interest of simplifying the existing regulatory regime, we recommend that this power replace existing powers under the Act to make blanket orders and rulings.*

*The Task Force also recommends the automatic conversion to rules of all blanket rulings and orders in existence as of the date of the enactment of the proposed legislation and which are not dependent on a policy statement for implementation. These rules would be in force for a two year period. (s.143(9)) The sunset period is designed to ensure the Commission a reasonable opportunity to redraft the blanket rulings as proper rules and then to facilitate adoption as permanent rules.*

*For other blanket rulings that depend on policy statements for implementation, and which are now in existence or to be adopted in the very near future after having been through an extensive notice and comment period, we also recommend the conversion of these instruments to rules for a two year period. For greater certainty, we set out in Appendix I a schedule which identifies the blanket rulings eligible for conversion in accordance with our criteria.*

We note that after blanket rulings have been converted to temporary rules, the Commission may, pursuant to the regime we are proposing, elevate the temporary rules to permanent rules without having to submit to a notice and comment period in the event that no material change has been made to the rule pursuant to s. 143a(3)(d) of the proposed legislation.

#### **(iv) Memoranda of Understanding**

As mentioned earlier, the memorandum of understanding constitutes a valuable mechanism for supporting inter-jurisdictional cooperation aimed at regulatory harmonization. As an instrument of policy, however, it is subject to some of the concerns respecting policy statements. Concern has been expressed regarding the absence of express statutory authorization

to enter into memoranda of understanding with agencies of the federal, provincial or foreign governments, and self-regulatory organizations.

*The Task Force recommends, for greater certainty, that the Act be amended to provide specific authorization to the Commission to enter into agreements and non-binding memoranda of understanding with financial service and securities regulatory authorities of or recognized by the Government of Canada, the territories, other provinces, and governments of other countries, including self-regulatory organizations. (s.143e(1)) Further, we recommend that the legislation restrict the scope of such agreements to matters relating to the administration and enforcement of the laws administered by the Commission and the other parties to the agreement. Given the inter-jurisdictional nature of many of these agreements, and their capacity to impact on matters of an inter-governmental nature, we recommend that MOUs be put before Cabinet for a period of 45 days for purposes of disapproval review. (s.143e(4)) We also recommend the timely publication of these instruments in the OSC Bulletin. (s.143e(6))*

*We, however, recognize that MOUs and agreements concluded between the Commission and the Ministry may concern certain sensitive administrative and financial matters that are not appropriate for public dissemination, and we therefore recommend that the disclosure of these instruments be left to the discretion of the parties. We do not recommend a formalized Cabinet disapproval review for such instruments. (s.143e(4))*

*Finally, we have refrained from recommending that the MOU power extend to registrants because we have concluded that such memoranda may have policy implications which make them the proper subject of the procedural safeguards proposed to accompany the policy and rule-making powers. We nevertheless recommend that the Staff have the explicit power to conclude settlement agreements with market participants and any other persons or companies, and further that these agreements, once approved by the Commission, be published at its discretion. (s.143e(1)(c); s.143e(3))*

#### **(v) Timely Commission Review of Staff Positions**

Several of the comments we received expressed the need for an expeditious and structured mechanism for permitting parties affected by a Staff interpretation of the legislation or subordinate instruments to be heard and to have these Staff views considered by the Commission. The First Round comments of The Toronto Stock Exchange are illustrative:

OSC staff do not facilitate ... the placing of staff interpretations of the Act and policy statements or staff positions of fact specific issues before the Commissioners for a formal decision. The Exchange advocates the establishment of procedures that would facilitate the hearing of what are in practice decisions of the staff before the tribunal. Ultimately, the government has charged the Commissioners with the administration of the Act. There should

be means in place to give practical effect to the exercise of that responsibility, especially if the OSC's powers are expanded. (at 12)

Presently, any party directly affected by a decision of the Director is entitled, pursuant to section 8 of the Act, to a hearing before the Commission in respect of that decision. We note that parties relying on this section have the procedural safeguards afforded by the Act and the *Statutory Powers Procedure Act*.<sup>26</sup> We recognize, however, that the right to a formal hearing is seldom invoked under the Act, particularly in respect of disagreements between the public and the Staff in the corporate finance or registration areas. The difficulty is that before an applicant can secure a right to a hearing, a formal decision, such as the denial of a prospectus receipt or a refusal to grant registration, must be made by the Director. This decision typically occurs at the end of a long review process, and may not be of assistance to parties anxious to complete their transactions in the time sensitive environment of securities markets.

In our interim report, we encouraged the Commission to review the operation of the section 8 hearing process with a view to determining whether parties are able to secure expeditious access to the Commission in the event of a material disagreement with Staff regarding certain interpretations or applications of the Act or subordinate instruments prior to the time at which a decision is formally made.

In our view, timely access to the Commission assures the public of an opportunity to test the principles and practices that constitute the securities regulation system against the Commissioners' expertise. The Commissioners involvement in these matters provides tangible evidence of their stewardship of and responsibility for the integrity of the system. Such access also enhances the Commission's policy making function; through resolution of material disputes between Staff and market participants, the Commissioners will deepen their understanding and appreciation of the day-to-day administration of the securities regime, and thus be able to play a more informed and effective role in securities policy development. We regard such rights of timely access to the Commissioners to be fundamental to the vitality of the combined system of securities regulation that is in place in Ontario today.

*We understand that both the Commission and the Staff are currently reviewing the matter of alternatives to the section 8 hearing process in order to address concerns raised by members of the public in the First Round consultations. In attempting to create processes which supplement the section 8 hearing we recommend that due consideration be given to the following factors:*

- (i) *the agreements or understandings reached through such processes must be transparent to the public. The agreements or decisions concluded through such processes may provide important and economically valuable information to market participants respecting the nature of the Commission's views, practices, and*

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<sup>26</sup> R.S.O. 1990, c.S.22.

*policies in respect of the Act and subordinate instruments. As such, information respecting such agreements or decisions could have significant precedential value, and should therefore be part of the public domain. However, given resource constraints, such transparency need not necessarily be realized through case-by case publication -- other forms of periodic publication may suffice.*

- (ii) *once devised and formally implemented, the existence of the processes should be made known to the public generally so as to ensure equal access;*
- (iii) *the processes proposed should not impair internal management practices of the OSC. In other words, the task of securing sound and effective day-to-day decision-making by the OSC should not be compromised by unnecessarily rigid or bureaucratic processes. We also believe that the processes should be sensitive to existing resource constraints, and should not provide opportunities for duplicative proceedings and panel shopping;*
- (iv) *the processes proposed should ensure the promotion and maintenance of the Staff's role. It should not inadvertently introduce incentives for members of the public to overstep Staff routinely in the event of disputes that could, subject to timing constraints, be resolved through further discussion and analysis with various Staff members. Nor should it allow access to the Commissioners in the event of disagreements involving relatively de minimis matters;*
- (v) *in circumstances where there are significant effects on non-represented third parties or if there are broad public interest concerns, the processes proposed may not be appropriate and the section 8 hearing process may be the only forum available to applicants. We would remit to the Commissioners the task of determining through stipulated criteria or otherwise when access to the mechanism is appropriate; and*
- (vi) *the process should be congruent with existing administrative law principles and policies.*

## **B. Rule-Making Power**

### **(i) The Role of Cabinet Regulation Making and the Case for the Conferral of Rule-Making Power on the Commission**

We recognize that, following the court decision in *Ainsley*, there will be increased interest in and demand for the elevation of various policy instruments to regulations. We emphasize, however, that it is neither desirable nor likely that all existing subordinate instruments

should or would be elevated to regulations. As noted in the First Round submission of the law firm of Stikeman, Elliott:

We do not believe that it would be a positive development if the policy-making function of the Commission was to be replaced by a rule-making function where all of the pronouncements of the Commission have the same legal status as statutes and regulations.  
(at 3)

While we strongly agree with this view, we also acknowledge that it is both likely and desirable that many of the Commission's subordinate instruments will be elevated to regulations and that significantly greater use be made of regulations for certain *de novo* initiatives.

Anticipating that the demand for regulations may increase, in the preparation of our interim report, we reviewed the capacity of the existing regulation-making structure to accommodate this pressure. We were particularly attentive to the need to ensure the Commission's access to a workable system of regulation-making given the relatively limited reliance the Commission has placed on regulations in the past.

Currently, securities regulations are made by the Lieutenant Governor in Council, meaning the Cabinet, after being proposed by the Commission and reviewed by the Minister. Although the Cabinet review process varies from government to government and from issue to issue, it involves a number of discrete steps that affords the Government the opportunity to assess the substantive merits of proposed regulations, the legal authority for the proposed regulations, the appropriateness and nature of the consultative process, and the congruence of the regulations with the Government's overall policy agenda. This process can typically take from four to six months if the proposals contain significant policy issues. Given competing demands for Cabinet time, the waiting period prior to the commencement of review may, in some circumstances, exceed six months.

In the case of securities regulation, it must be recognized that Cabinet review of proposed securities regulations generally follows a comprehensive notice and comment process conducted by the Commission. This process involves at least one round of public consultation based on a published request for comments in the OSC Bulletin, and often two or more rounds of such consultation. Based on the Commission's experience with policy statements, this process may take anywhere from six to twelve months. Typically, with a few notable exceptions, the Cabinet has tended to adopt the regulations and even legislation proposed by the Commission, subject to only minor modification.

In light of our stated concern with efficient resource utilization, the salient question is whether for most Commission initiatives the supplementary review undertaken by Cabinet of regulations justifies the administrative resources and time delays, given the intensity of the demand for Cabinet time. In the securities regulation context, we believe that this question must be answered generally in the negative.

The principal reason for our scepticism derives from the technical nature of securities regulation. Securities regulations address an extremely wide range of activities -- from registration and prospectus requirements, to mutual funds, to take-over bids. As such, they require a high degree of specialized expertise by persons familiar not only with the framework and philosophy of securities regulation, but also market practice. The technical nature of securities regulation dampens the need or scope for a broad-based inquiry into the political merits of a given initiative. Technical regulation also diminishes Cabinet's ability to engage in meaningful substantive review.

Having stated that the benefits of Cabinet review for most types of proposed securities regulations are unlikely to outweigh the accompanying costs, we wish nonetheless to acknowledge the exceptional. Not all securities regulation involves issues of a purely technical character, and there will certainly be cases in which the subject matter of regulations is ripe for productive cabinet involvement. Indeed, even technical regulation may sometimes have broad policy implications that should involve the elected branch of government.

*In view of the concerns expressed over the efficacy of Cabinet review of all proposed securities regulations, the securities regulatory expertise of the Commission, the pace of development and change in the capital market, and the need to devise workable arrangements to accommodate the anticipated demand for new regulations from the Commission, we recommend the conferral of a rule-making power on the Commission. Properly constituted rules would have the same force and effect as regulations. Breach of the rules would attract the same sanctions as breach of legislative or regulatory requirements.*

We note widespread public support for the conferral of rule-making power on the Commission. This support was expressed to us by commentators in both rounds of the Task Force's notice and comment process. Indeed, of the 27 comments we received during our Second Round consultations, only one expressed unequivocal opposition to the recommendation that rule-making powers be conferred on the Commission.

The Second Round comment of the law firm of Davies, Ward & Beck is illustrative of the widely expressed public view:

We agree with the general thrust of the Report, to the effect that the rule-making authority of the OSC should be explicitly recognized in law, subject to appropriate safeguards and checks and balances ... We share the view of the Task Force that this model provides an appropriate continuing political oversight by the provincial executive, while vesting the primary rule-making function in the hands of an expert agency. (at 1)

## (ii) Statutory Authorization for the Rule-Making Power

As we discussed in our interim report, one of the most difficult issues for the Task Force concerned the nature of the statutory authority for rule and regulation making. As we noted earlier, the Act presently contains a provision -- section 143 -- that details the scope of the Cabinet's regulation making authority. In our deliberations leading up to the interim report, we considered carefully the capacity of this section to serve as the basis for Commission rule-making.

To assess the viability of this approach, the Task Force asked Staff to identify the existing policy statements that they believed could be implemented as regulations pursuant to the current section 143. We caution that we have no expectation that the wholesale elevation of policy statements and other subordinate instruments to rules is either likely or desirable. Nevertheless, the exercise provided a useful litmus test of the magnitude of future strains to be placed on the rule-making process if the Legislature were to rely on existing section 143 to support Commission rule-making and Cabinet regulation-making in the post-*Ainsley* environment.

Of the 98 different policy statements presently being applied in Ontario, the Staff found that 43 (43.8%) could not be covered by existing section 143; that 31 (or 31.6%) would be fully covered by existing section 143; and that 24 (or 24.4%) could be partially covered by certain paragraphs of existing section 143. The Staff review explicitly noted that "of the 40 policy statements administered solely by Corporate Finance Branch, a significant number that are relied upon by the branch in its day-to-day operations are not covered by section 143".

The results of this review make clear the fact that, without substantial modification, existing section 143 cannot accommodate the appropriate elevation of existing policy statements to rules.

In light of this study, we then considered the prospect of relying on piecemeal amendments to section 143 that could give effect to broader rule-making powers. On one hand, the virtue of this approach is that it would allow the Legislature to consider closely the case for rule-making in subject areas outside of the current provision. In this way, the Legislature could properly fulfil its responsibilities for the overall framework for the Act. As we discuss below in Part IV.G, we think that a commitment to ongoing legislative review would greatly enhance the operation of the provincial regulatory system.

On the other hand, we were mindful of the rather daunting task that the Commission will face in order to rehabilitate and convert some of the existing policy statements to rules in the new regime. We were also aware that in most of the areas where the Commission has developed policy statements, its subject matter jurisdiction is without normative controversy. The fact that there is not now express statutory authorization for regulations in certain areas reflects less any coherent public apprehension about the legitimacy of regulatory activity in these areas, than the practical reality that the policy statement, until the *Ainsley* decision, was one of the principal instruments used in the regulation of securities markets, and, as such, did not

provide any incentive for the Commission to request, nor for the Legislature to confer, express statutory authorization on the OSC for new and legitimate subject matters.

In our interim report we recommended that, as in the case of policy statements, the Commission be permitted to make rules governed by the purposes and principles section of the Act. We arrived at this recommendation after expending considerable time and energy (alone and in concert with the OSC) evaluating alternative avenues for rule making authority, all of which appeared vulnerable to certain deficiencies. The purposes and principles approach was meant to ensure that rule-making power was constrained both by the entire structure of the Act and by certain confining principles. We regarded the purposes and principles concept as a pragmatic compromise among competing authorization techniques. The intention was that the Commission's rule-making would be confined to areas of current regulatory activity in respect of which no jurisdictional concern exists, but that the Commission would be required to seek explicit legislative assistance when wishing to undertake activities that depart from this core.

While some support was expressed for this approach, several Second Round comments expressed strong reservation with the capacity of the proposed purposes and principles provision to provide determinate guidance to the Commission and the public respecting the scope of legitimate rule-making authority.

The Second Round comments of The Toronto Stock Exchange are instructive in this regard: "[w]hile the Exchange strongly supports the recommendation to empower the Commission to make rules, the Exchange is concerned that the limitations on such authority suggested in the interim report are too general to be of any practical import". (at 1)

In a similar vein, the law firm of Fasken Campbell Godfrey stated that

[w]e perceive that there is a risk that, without a clearly defined and enumerated power granted to the Commission to make rules in the form of present section 143 of the Act, the proposed rule-making authority granted to the Commission could possibly be the subject of abuse by a future Commission which could conceivably attempt to re-write specific obligations set forth in the Act and Regulations in the guise of Commission-made rules. (at 3)

Cutting in a different direction, the OSC's Second Round comment expressed concern with the ability of the purposes and principles approach to support policy statements that could, on some views, be deemed to be outside of the express contemplation of the Act. The OSC also drew our attention to the fact that there would be conflicts with the Act if certain policy statements were elevated to rules. In order to accommodate the elevation of these instruments, several of the Act's terms would need to be modified. It was the opinion of the OSC that the purposes and principles provision, as currently drafted, might not be adequate to provide assistance in this regard. The OSC was also concerned with our recommended revocation of existing section 143, which now permits Cabinet to vary by regulation certain of the Act's

terms in specific areas. As a consequence, the OSC sought the adoption of a general statutory power that would allow it to make rules that would "impose requirements that are greater, lesser, or different than those otherwise applicable under the Act." (at 4)

Given these competing views, the Task Force was obliged to re-examine the substantive scope for rule-making authority recommended in the interim report. Based on this review, the Task Force decided to develop a detailed statutory provision that would authorize and structure both the Commission's rule-making and Cabinet's regulation-making authority. The section was developed with the assistance of outside counsel, and involved a painstaking review of the statute, regulations, and policy instruments in order to determine the scope of the needed authority.

In undertaking this task, the Task Force sought to create a statutory provision that would lend precision to the scope of rule-making authority, thereby affording both the OSC and the public greater certainty. We regard market certainty to be critical to the integrity of the regulatory regime. In the view of the Task Force, were power required to be conferred on either the Commission or Cabinet to vary the application of the Act's terms in certain areas, it was our belief that the power should be precisely drawn and clearly limited. Thus, we wanted to address explicitly the potential for inconsistencies between the content of existing policy statements which might be elevated to rules and the Act, but without having to invoke a broad override clause. We also hoped to be able to regularize the OSC's authority in all non-controversial areas, while ensuring an incentive for the OSC to petition the Legislature when embarking on initiatives outside of the scope of, or in fundamental tension with, the existing regulatory scheme. We did this by drafting a rule and regulation-making provision--proposed section 143(1)--that would provide precise support for all existing subordinate instruments except for those few policy statements or subject matters which, as discussed below, are characterized as controversial.

In this respect, we emphasize that we did not consider it either necessary or desirable to develop a foundation for the OSC's rule-making power which would preclude the need for future legislative or regulatory amendment to accommodate unanticipated developments in securities regulation. For example, while we would see little value in the Commission being required to seek legislative assistance to introduce a new alternative prospectus regime or to change the seed capital standards of mutual fund issuers, we speculate that, had the regime we are proposing for Commission rule-making been implemented several years ago, the Commission would have now been required to return to the Legislature to gain the specific authority we recommend be conferred on the Commission to make rules in respect of derivative products (*s.143(1)(34)*).

To facilitate future legislative refinements, the Task Force recommends below several institutional modifications (such as the quinquennial Ministerial review of the Act) that increase the likelihood of timely statutory amendment.

The new rule/regulation-making provision we propose for the Act is set out in section 143(1) of the draft legislation contained in Appendix I. We note that the provision was

not circulated to the public for comment prior to its inclusion in this report. We would anticipate that some further refinement will be warranted before the section is enacted. Nevertheless, we believe that the draft section demonstrates that a coherent and fully specified authorization provision can be constructed, and further, is capable of imparting meaningful structure to the Commission's rule-making power. We regard such comprehensive specification of rule-making authority as appropriate and necessary given the relatively innovative nature of our recommendation that a broad rule-making power be conferred on a major Ontario regulatory agency.

We also include in Part 2 of Appendix I a short list of powers for which we believe strong arguments for inclusion in the new rule/regulation-making provision exist, but which are nonetheless beset by some degree of controversy. We have therefore chosen to leave to the Legislature, assisted by further public debate, the task of assessing the arguments for and against inclusion. In any event, we expect that each of these issues can be resolved in conjunction with the enactment of the draft implementing legislation, and that the latter would be modified to reflect the resolution.

In this area, we note the criticism expressed by some commentators of OSC Policy 9.1, particularly in respect of the rules governing related party transactions. These commentators expressed general concern with the utility of invoking securities regulation techniques to address matters within the sphere of corporate governance, which, it was claimed, should be remitted exclusively to the province of courts and corporate law.

We observe that the boundaries between securities and corporate law are often blurred, and, at both a normative and pragmatic level, are difficult to draw with confidence. We note that, at one time, the rules governing insider trading and shareholder communications were matters relegated exclusively to corporate law. Few would now question the suitability of measured intervention in these areas by securities regulators. We also note the considerable familiarity that the public has now developed with the operation of OSC Policy 9.1 in all areas.

*In this area, we recommend the statutory adoption of rule-making power which would provide clear support for all aspects of OSC Policy 9.1 but for the provisions governing related party transactions. We characterize the provision providing authorization for related party transactions as controversial, and anticipate resolution through further legislative attention.*

### **(iii) Cabinet Review of Commission Rules**

We considered a number of different mechanisms for Cabinet review of Commission rule-making. Some First Round submissions to the Task Force cautioned against duplicative processes through the introduction of ministerial involvement in securities policy-making, including ministerial over-ride or Cabinet veto of Commission rules. A few suggested that such a review power would subject the Government to undesirable political lobbying and would impair the Commission's ability to act, independent of partisan political influence.

On the other hand, several of the First Round submissions we received regarded some level of Cabinet involvement in the rule-making process as necessary for ensuring Commission accountability in our responsible system of government. For instance, the First Round submission of Mr. John Howard noted that "cabinet review obviously is desirable as a political safeguard on any arbitrary action by the Commission in its recommended regulations". (at 1) We observe that the Staff's First Round submission to the Task Force did not object to a Cabinet veto, although they did not consider it to be necessary.

*We recommend that Cabinet be vested with the right to disapprove any rule within sixty days of its adoption by the Commission. (s.143c(2)) Rules not explicitly disapproved within the sixty day period would then become effective upon publication of official notice of the expiration of the disapproval period in the Ontario Securities Bulletin. The rule could not take effect until at least 15 days after the expiration of the disapproval period. We would also expect that notice of the expiration of this period would be published in the Ontario Gazette. Under this system, in practice, Cabinet would review only those Commission rules referred by the Minister to the Cabinet for consideration for disapproval. In this manner, the Minister and Cabinet would be able to limit their involvement to those matters where the value of broader public policy review is greatest.*

We have considered what options should be available to the Cabinet once a rule has been placed before it for consideration under the disapproval process. It could be argued that the integrity of Commission decision-making is best preserved if the Cabinet is restricted to disapproval only. The argument is that if the Commission's rule has failed to secure Cabinet imprimatur, it should be the Commission as sponsor that is vested with the task of reconstruction. It is the Commission which ultimately bears enforcement responsibility. Also, limiting Cabinet's options to disapproval only might raise the threshold for intervention so that Cabinet would only engage in review when a pressing issue of principle were involved.

Nonetheless, in our determination to preserve the integrity of Commission decision-making, we do not want to compromise the statutory role of the Lieutenant Governor in Council in regulation making. We are also loath to impose constraints that may spawn unnecessary delay. *Therefore, we recommend that Cabinet be vested with the explicit statutory power to either disapprove or amend a Commission rule within the disapproval period. (s.143c(2)(c)) In the event that Cabinet opts for simple disapproval, we would expect as a matter of course that the Minister would provide instructions to the Commission as to the issues of concern to Cabinet and the amendments necessary or matters requiring reconsideration or further study before Cabinet assent can be obtained. We would further expect that these comments would be placed on the public record. (s.143c(4)(b)) We would not require the Commission to remit the subject matter of Cabinet's instructions to a further notice and comment review period. The process following Cabinet disapproval would be at the discretion of the Commission and may vary depending on the nature of Cabinet's instructions.*

*The Task Force expects that the disapproval process would be invoked only sparingly. Frequent disapproval would attenuate the commitment of stakeholders to active*

*participation in the Commission's notice and comment process, which we regard as the principal forum for public deliberation and debate over securities rule-making.*

*We also considered the appropriate scope of the Cabinet regulation-making power. The Task Force recommends that Cabinet's jurisdiction to make regulations be co-extensive with the Commission's jurisdiction to make rules. We would further provide that Cabinet be able to promulgate regulations which would have the effect of repealing Commission rules or Cabinet regulations, but that the Commission's powers of repeal be limited to its own rules.*

In order to facilitate the proper conversion of policy statements to rules, some integration of existing regulations and these proposed rules will be required. One way of achieving this integration would be to provide for a general conversion of all regulations to rules at time of enactment of the legislation. Another way to integrate the regime is through *ad hoc* repeal of certain regulations by Cabinet contemporaneously with the elevation of certain policy statements to rules.

*Based on our desire to maintain the role of Cabinet, and also to ensure the workability of the proposed regime, we recommend that the Legislature provide the Cabinet with the power to convert selectively existing regulations to rules. (s.143(8)) We also recommend that, at the time of enactment, revisions be made to existing regulations so as to reduce the scope for de minimis conflict between regulations and rules. Finally, to ensure the effective operation of the system, we recommend that Cabinet regulations be paramount to rules to the extent of any conflict. (s.143(11))*

*Following the suggestion of several commentators, we endorse the value of Ministry adherence to a consultative regime that is similar in nature to the notice and comment procedure we stipulate for Commission rules when originating regulations.*

In providing for this structure, we wish to emphasize that it is not our intention to promote the formation of parallel and potentially rivalrous modes of securities policy-making in government. Historically, Cabinet has relied on the OSC to formulate regulations, and we would not expect any departure from this arrangement. In other words, our recommendation for co-extensive regulation and rule-making power is designed to render Commission rule-making power congruent with the traditions embedded in our responsible system of government.

#### **(iv) Judicial Review**

Some of the First and Second Round comments we received stressed the contribution that judicial review could make to the operation and integrity of the existing regulatory system, and, in particular, to the exercise of rule-making activity by the Commission. The argument is that like many of the other substantive and procedural protections that accompany the rule-making power, judicial review can improve the accountability of agency decision-making.

Having acknowledged the value that judicial review can lend to a balanced and accountable rule-making system, the question is what should the nature of judicial oversight be in respect of the Commission's exercise of such powers. In this regard, we note that rule-making is a form of delegated legislation making. Providing that the Commission is exercising its rule-making activity in an area where it has jurisdiction and where the rule is made without procedural defect, its decisions ought to be accorded considerable curial deference.<sup>27</sup>

Given the existence of general statutory powers of review of agency conduct in respect of delegated legislation making, we have declined to recommend the introduction of a separate statutory power of judicial review for the Commission's rule-making. In our view, the principal check on the agency's rule-making activity should emanate from vigorous and informed citizen participation in the rule-making process.

## **C. Notice and Comment**

### **(i) Codification of Notice and Comment Obligation**

It has been said that the regulatory agency is a "government in miniature".<sup>28</sup> If so, the nature of the processes used to facilitate active and informed participation in policy development is critical to the legitimacy of the product. The vast majority of submissions we received endorsed the statutory entrenchment of a structured notice and comment procedure for the making of rules by the Commission.

The magnitude of the rule-making power recommended for the Commission requires considerable attention to the checks and balances that will accompany its exercise. We regard an effective notice and comment procedure as the central mechanism for ensuring the accountability and transparency of Commission rule-making. While the substantive standards we enumerate in the proposed section 143(1) will impart critical guidance to the Commission and the public regarding the scope of Commission rule-making, ultimately, informed involvement by stakeholders in the rule-making process will be necessary to ensure the production of responsive and responsible rules.

Notice and comment consultation is by no means novel to the Commission. In the past, it has been used regularly and effectively in the development and adoption of policy statements. For instance, the Canadian Depository for Securities Limited observed in its First Round submission that:

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<sup>27</sup> See discussion in Robert Reid and Hillel David, Administrative Law and Practice, 2nd edition (Toronto: Butterworths, 1978).

<sup>28</sup> John Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual and The Functional", (1935) 1 UTLJ 53 at 56.

With regard to the development of policy statements, in particular, National Policy 41, the Commission staff have involved CDS throughout the process and have responded to our concerns fairly and expeditiously, recognizing the business realities associated with the problems in shareholder communications. In view of the broad number of interested parties in these issues, the ability to reach consensus and achieve improvements has been remarkable. (at 3)

*The Task Force recommends that the Commission be required to submit all proposed rules to a notice and comment procedure prior to their adoption. Under the notice and comment procedure, the Commission would be obliged to publish a proposed instrument along with a request for comments in the OSC Bulletin. (s.143a(1)) The public would be allowed at least 90 days to consider the proposed rule and furnish any submission to the Commission. (s.143a(2)) If material amendments to a rule were made by the Commission after the conclusion of the initial notice and comment period, the Commission would be obliged to remit the amended instrument to a subsequent round of notice and comment. However, given public familiarity with the general content and design of the amended instrument, we believe that the public would not be adversely affected by a more circumscribed period of consultation on subsequent rounds, and we would remit to the Commission the discretion to determine the appropriate length of time for successive rounds of consultation. (s.143a(4))*

*We also recommend that the Commission be required to publish the final form of the proposed rule adopted by the Commission in the OSC Bulletin. (s.143a(5)) If the rule is subsequently modified by Cabinet as a result of disapproval review, the Commission should be required to publish the amended rule. If the rule is disapproved by Cabinet, the Commission should publish timely notice of the disapproval and, if available, Cabinet instructions accompanying the disapproval. (s.143c(4)(b))*

*Finally, we recommend that the Commission not be bound to follow the prescribed notice and comment procedure when:*

- (a) the effects of the rule are restricted to certain named individuals who are provided an opportunity for a hearing on the proposed rule. (s.143a(3)(a))*
- (b) the rule relates only to organizational or procedural matters internal to the Commission, and is not likely to have a substantial impact on the interests of persons or companies, other than members of the Commission or employees of the Commission, who are affected by it; (s.143a(3)(b))*
- (c) the rule grants an exemption or removes a restriction and is not likely to have a substantial impact on the interests of persons or companies other than those who benefit under it; (s.143a(3)(c)) or*
- (d) the rule makes no material change to an existing rule. (s.143a(3)(d))*

## (ii) Request for Comments and Supporting Statement

Some of the submissions we received expressed concern with the amount of supporting material distributed by the Commission at the time of publication of a proposed policy statement. Without sufficient background information, it is difficult for the public to assess meaningfully the factual basis for or merits of a proposed rule or policy statement. This impairs the goals of transparency, accountability and participation in public decision-making.

*To address the need for increased information, we recommend that the Commission be required as part of its notice and comment process to publish a Supporting Statement that would, in general, include the following materials: a description of the objective of the proposed rule, the statutory power relied upon, and the alternatives, if any, that were considered and why those alternatives were rejected, a reference to any significant unpublished study, and, finally, a qualitative description of the anticipated costs and benefits of the proposed rule. (s.143a(1)) The general content of this statement could be informed by the purposes and principles of the Act.*

By and large, as demonstrated by past practice, the Staff have been successful in furnishing the public with well articulated and coherent statements in support of policy statements. *To ensure the efficacy of the Supporting Statement, we recommend periodic public review of the content and use of the statement with the Commission. In this way, the Commission could experiment with different forms of the statement, and could adopt those forms which had proven most useful to the public.*

We emphasize that the preparation and circulation of a Supporting Statement constitutes only a minimum standard of disclosure. We encourage the Commission to adopt a presumption in favour of disclosure of any and all materials that would assist the public in evaluating the case for a given policy initiative, subject to the obvious proviso that the Commission not compromise its enforcement or investigative activities through such disclosure.

In this respect, we note the very extensive and thoughtful record that Staff had prepared in support of the policy statement (draft Policy 1.10) that was the subject of the *Ainsley* decision. These materials included an exhaustive analysis of the complaints received by the OSC in the penny stock area, past Commission and court decisions involving the sale of penny stocks, interviews with industry participants and the structure and operation of the SEC approach to penny stocks. These materials were not released publicly until the commencement of judicial proceedings against the Commission. We cannot help but observe the salutary effect that earlier release of these materials would have had on public appreciation of the rationale for the policy.

## (iii) Staff Summary of Public Comments and the Commission's Reply

Several First Round public submissions focused on the need for the Commission to demonstrate a clearer link between the comments it receives from the notice and comment process and the final form of the proposed policy statement or rule. In the view of the Task Force, the rule-making process would be enhanced if the public were advised in summary fashion

of the range of views reflected in comments received with respect to a proposed rule and provided with an analysis of the reasoning behind the Commission's conclusions, as reflected in the ultimate policy.

*To increase public confidence in the integrity of the notice and comment process, we recommend that the Commission be required to publish a summary of comments received from the public during each round of consultations. (s.143a(5)) The Summary of Public Comments would permit the public to discern the essence of each of the submissions filed, as well as the thrust of the submissions taken as a whole. For purposes of economy and accuracy, we recommend that the Commission consider encouraging commentators to furnish the OSC with a summary of materials submitted in response to a request for comments.*

One particularly difficult issue concerns the role, if any, for confidential comments tendered during the notice and comment process. It is around this issue that two of our foundational principles, namely transparency and broad participation, directly collided. In its Second Round brief to us, the OSC stated that

While we appreciate the benefits of public disclosure of comments in order to ensure a full and thorough canvassing of issues, we note that confidentiality may be warranted in a variety of circumstances (e.g., proprietary trade information and information that would, if disclosed, adversely affect relationships with clients). It has been our experience that information which is sensitive may be invaluable for purposes of appreciating the relevant issues. (at 9-10)

*We concur with the OSC, and recommend that the Commission have authority to determine on a case-by-case basis whether or not it can grant confidentiality at the request of a commentator, subject to the Freedom of Information Act.<sup>29</sup> (s.143a(8)) We would expect that the weight of confidential submissions would be appropriately discounted by the Commission to the extent that public testing of the substance of the submission is lacking.*

We further recommend that the Commission be required to respond to the material issues and concerns raised in the notice and comment process in a statement ("Commission's Reply") published with the adopted rule. (s.143a(5)(d)) Particularly where there has been concentrated public opposition to or concern expressed with certain aspects of a proposed rule, the Commission's Reply would afford the public the opportunity to understand clearly the reasons for the final form of the policy instrument. The preparation of the Commission's Reply reinforces the Commissioners' central responsibility for the integrity of the Province's securities regime.

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<sup>29</sup> *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c.F31.

#### **(iv) Public Hearings**

Several submissions identified the contribution that public hearings could make, in some circumstances, to the notice and comment process. Through face-to-face meetings, the public would be able to clarify their written comments and respond to specific questions and concerns raised by the Commission. In this way, the Commission would be able to test the factual premises upon which submissions were made and appreciate more fully their implications.

While the greater use of public hearings in the notice and comment process was endorsed in some of the submissions, most parties also recognized the time and resource constraints inherent in the process, and did not advocate that the hearing be a mandatory component of the notice and comment procedure. We share this view.

*We endorse the use of public hearings to the extent they may enhance the development of certain policy instruments in appropriate circumstances.*

#### **(v) Waiver for Exceptional Circumstances**

We considered the desirability of delegating to the Commission the authority to make rules in exceptional circumstances without submitting the proposed rule to the notice and comment process. The submissions were divided on this issue. Several expressed scepticism of the need to create exemptions from the notice and comment procedure. Some conceded the possibility that exceptions to the notice and comment procedure may be necessary to enable the Commission to respond to particularly abusive situations, but were not fully persuaded of the necessity for what they termed to be an "extraordinary power".<sup>30</sup>

Other commentators were in favour of conferring a power on the Commission to waive the application of the notice and comment process in exceptional circumstances. They noted that this power was vested in the SEC and endorsed it for circumstances of a pressing or immediate nature where consultations would be impracticable or would defeat the purpose of the rule. In such cases, the waiver would permit the enactment of a rule on an interim basis only. The interim rule would have an expiry date and would be subject to notice and comment scrutiny before being enacted on a permanent basis.

In addressing this issue, we were cognizant of the sparing use the Commission has historically made of the waiver power. However, we were also aware that on the very few occasions the Commission exercised this power, its decision was attended by considerable controversy. In this respect, we observe that the first iteration of Ontario Securities Commission Policy 9.1 was published without prior notice and comment review.

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<sup>30</sup> See First Round submission of Goodman & Goodman at 4.

*We recommend that the Commission be permitted to waive or abridge the notice and comment process in the event of matters of urgency as evidenced by the risk of material harm to investors or the integrity of capital markets. Such an interim rule would only be permitted to remain in force for a period of 9 months.<sup>31</sup> (s.143a(3)(e); s.143c(3)) We further recommend that the adoption of an interim rule be made only with the express approval of the Minister. (s.143a(3)(e)(ii)) Finally, we recommend that the Commission be bound to publish in the OSC Bulletin its reasons for waiver or abridgement of the notice and comment process at the time of enactment of the interim rule. (s.143a(3)(e)(i))*

#### **(vi) Transitional Arrangements**

In our interim report, we considered the advisability of allowing the Commission a temporary grace period from the notice and comment process in order to elevate existing policy statements to rules, perhaps without any prior amendment of the policy statement. The argument for such treatment is based on the uncertainty that might exist within the community respecting the status of policy statements, the need to insulate the Commission from further unproductive judicial challenges as to the validity of policy statements, and the lack of benefit to be derived from revisiting in a fundamental way the substantive merits of existing policy statements that the Commission wishes to enact as rules.

While sympathetic to these considerations, we were nevertheless concerned that a grace period for the elevation of existing policy statements to the status of rules might bring the regime we are recommending into disrepute. Our position was based on several factors. First, we were of the view that any policy statement elevated to a rule would attract the enforcement sanctions governing legislation and regulations. In our view, market participants should not have to be subject to binding rules unless, at the time that they were proposed and reviewed, the public well understood their mandatory character and was afforded the benefit of appropriate procedural protections.

Second, we were concerned that the elevation without amendment of hybrid policy statements to rules would create considerable confusion for market participants. As mentioned earlier, it is unclear how market participants could comply with a rule containing both narrow mandatory requirements as well as general exhortations of responsible conduct.

Third, we did not want to support measures which might detract from rapid review and rehabilitation of the existing policy statements by the OSC. In our view, refusal to extend special transitional treatment to existing policy statements provides the strongest incentive for a timely (and short) review and rehabilitation period. On the basis of these factors, we decided not to recommend any special transitional provisions.

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<sup>31</sup> This period is 3 months longer than we proposed originally, and is designed to give the Commission sufficient time to complete the standard notice and comment procedure we have prescribed in respect of the interim rule.

The issue of transitional arrangements attracted some attention during the Second Round of comment. In its Second Round submission, the OSC identified 15 different policy statements that it felt should be elevated to rules at the time of enactment of the proposed legislation.<sup>32</sup> As a variant on this request, the OSC suggested a three year grandfathering period during which time the 15 identified policies would be deemed to be rules, but would lapse at the expiration of the period in the absence of further action.<sup>33</sup>

In contrast, other commentators echoed our stated concerns with the effects of allowing broad transitional arrangements. For instance, in its Second Round submission, the law firm of Tory Tory DesLauriers & Binnington stated that: "[w]e agree with the Report's conclusion that no specific transitional rules are necessary ... The Commission should be encouraged to dedicate the resources necessary to get its house in order and we believe, as the Report indicates, that grandfathering particular policies or portions of particular policies undermines the recommendations of the Report." (at 3)<sup>34</sup>

Support for our interim recommendation was also related to the perceived resilience of the securities regime to the effects of the *Ainsley* decision. In its Second Round submission, the law firm of Stikeman, Elliott stated that "[b]ased on our experience, we do not believe that there has been any severe adverse impact on the general behaviour of the marketplace as a result of the *Ainsley* and *Pezim* decisions. Accordingly, we would suggest that the Task Force resist any suggestions for a 'quick fix' or a 'stop-gap measure'". (at 2)

Similarly, in his Second Round submission, Mr. James Baillie stated his opposition to the granting of general transition relief for policy statements with the exception of providing

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<sup>32</sup> The list of policy statements proposed for elevation by the OSC was developed by identifying those policy statements which: "(a) are necessary for purposes of maintaining business certainty to capital markets participants or investor protection (particularly in a post-Ainsley environment which may result in policy statements being subject to more frequent challenge); (b) are established, in that the practice and procedure in respect of such policy statements has "crystallized"; (c) prior to being adopted by the Commission, have been subject to a notice and comment period; and, (d) are consistent with the purposes and principles recommended by the Task Force. Moreover, a number of the policy statements .. are of such significance that they may be characterized as independent regimes, which are essential for the functioning of certain sectors of Ontario's capital markets ... Most of these policies are National Policies, forming part of an interprovincial scheme designed to result in uniformity of treatment, to the benefit of the Canadian capital markets generally." (at 2)

<sup>33</sup> The OSC received support for this position from the Second Round submission of the Investment Dealers Association of Canada (OSC should be empowered to elevate automatically to rules those policy statements which have stood the test of time and which have maintained their currency through being the subject of ongoing comment to rules, without having to go through a notice procedure (at 3)) and of Mr. Philip Anisman ("the Act should provide for a two-year period for a process of legitimization, which should ensure that all existing regulatory instruments that are to continue in effect would be subject to review by the cabinet and by a court." (at 15)).

<sup>34</sup> See also: Fasken Campbell Godfrey (If law is to be obeyed it must be unambiguous and capable of being discerned. Many of the policy statements that the Commission suggests be elevated to rules are lacking in one or both of these elements (at 5-6)).

explicit protection to existing policy statements in respect of challenges to their validity for failure to have conformed to a prescribed notice and comment regime. He stated

[t]hat no serious concern is being expressed about the first of these [transition] stages [from now until the Task Force's recommendations are enacted] bears testimony to the stability of the existing system; logically, the *Ainsley* decision ... might have been expected to cause consternation among practitioners in the area, with a consequent outcry for urgent amendments to the Act.

That no such outcry has occurred leads me to feel that the Commission's suggestion that a number of existing policy statements be anointed as rules should not be implemented. (at 8)

In light of the comments received, the Task Force once again reviewed the need for special transitional arrangements to respond to potential uncertainty occasioned by the *Ainsley* decision. *Despite the concerns expressed by some commentators with our interim recommendation, we remain persuaded for the reasons discussed that, with the exception of blanket rulings and orders described above, no formal transition arrangements should be devised to elevate existing policy statements to the status of rules. We believe that this recommendation provides the strongest assurance that the integrity of the overall regime we are proposing will be preserved. We strongly counsel against the validation of all existing policy statements through legislative means, even for a discrete period of time.*

*As noted earlier, the validity of non-binding policy statements is not impugned by the Ainsley decision. Also, we believe that additional critical support for the stability of the transitional period is provided by our recommended conversion of existing blanket rulings to rules (including, for some identified blanket rulings, accompanying policy statements).*

Nevertheless, for sake of certainty, we do recommend the conferral of explicit protection of existing policy statements from challenge notwithstanding their failure to conform to the prescribed notice and comment regime we propose for policy statements. For similar reasons, we also recommend the enactment of a statutory provision that would safeguard that the validity of existing policy statements from challenge solely by reason of the fact that they were adopted by the Commission prior to the enactment of the proposed legislation.

We anticipate that, during the pendency of the transition period, market participants and Staff alike will endeavour to ensure the continued operation of the existing system which is dependent on policy statements.

Having stated our reluctance to endorse the creation of any special transition measures for policy statements, we note that, even prior to the enactment of legislation, the Commission could achieve the elevation of select policy statements to Cabinet regulations. In such circumstances, we expect that the Commission would reformulate and revise the policy

statement in the manner appropriate for its elevation to the status of a regulation, and then submit it to a notice and comment period that would afford the public a reasonable opportunity to comment. We would hope that the Government would accommodate any Commission requests for enactment of these regulations.

*We further recommend that the process of reviewing and reformulating policy statements commence immediately. To this end, we recommend that the Commission devise as soon as possible an appropriate transition regime and, further, that the Government, after having reviewed this strategy, provide the Commission with the resources necessary to implement this regime forthwith.*

*We also recommend the implementation as soon as is practicable of appropriate changes to existing notice and comment regimes based on the techniques we develop in the report in respect of all new regulations, blanket orders, and policy statements proposed by the Commission.*

## **D. Other Mechanisms for Consultation**

### **(i) The Need for Early Consultation**

Several of the comments we received suggested that the quality of securities policy-making is enhanced by public consultation at the time the Commission first contemplates a given policy initiative rather than later when the Commission's thoughts on the initiative have crystallized. By "thinking out loud", the Commission benefits from the public's views of a given policy or interpretation issue before becoming wed either to a characterization of the issue or a specific solution or interpretation.

*We endorse the practice of early consultation, and suggest that the Commission consider innovative ways of stimulating informed and creative public input, including: the publication of public requests for examination by the Commission of specific questions of policy and interpretation; "concept releases" (identification of basic issues and possible responses coupled with a public notice and a request for comment); open, informed "town hall" meetings convened to analyze a specific regulatory question or problem; and the preparation and dissemination of Staff studies. The latter have been used extensively and successfully by the SEC to address significant and controversial policy issues such as the competitive structure and operation of capital markets and the securities industry.*

### **(ii) Annual Statement of Priorities**

Several commentators noted the contribution that an annual report of priorities prepared by the Commission could make to the legitimacy of Commission action.

*We recommend that the Chair of the Commission be statutorily required to prepare and circulate an Annual Statement of Priorities. (s.143g(1)(9)) In contrast to annual reports*

*currently prepared by the Commission (which are primarily retrospective), the Annual Statement of Priorities would be prospective in orientation. The Chair would articulate priorities for the forthcoming year and the reasons why these priorities have been adopted. Of course, given the existence of resource constraints, these priorities would have to yield to pressing or unanticipated matters. We would imagine that this statement could be appended to the OSC's annual report.*

We believe that the Chair should invite the public to participate in the preparation of the Annual Statement of Priorities. Specifically, the Chair should ask the public to identify its view of the Commission's priorities, thereby ensuring that issues and priorities not immediately apparent to the Commission, but which are nonetheless salient to the public, would be reflected in securities public policy formulation. We would encourage the Chair to consider innovative ways of securing a broad spectrum of public input into the development of this document.

### **(iii) Annual Regulatory Status Report**

When measured against regulatory instruments used in other contexts, the life span of securities regulatory instruments is relatively short. Rapid market innovation and change greatly increase the risk of outdated or outmoded regulation. Some of the comments we received questioned the adequacy of the opportunities for ongoing public assessment of the efficacy of existing policy instruments. For instance, in its First Round submission to the Task Force, the law firm of McCarthy Tétrault noted:

Commission policy-making appears to work less effectively once a particular initiative has been adopted. The on-going review by the Commission of policies to determine when they require revision or have outlived their usefulness has historically been a "hit or miss" affair. There is no established mechanic for overhauling policy statements and, with certain exceptions...little is known as to how policies are administered subsequent to their adoption. (at 2)

*To address this problem, we recommend that the Commission entertain submissions continuously from the public regarding the content, application, and efficacy of its regulatory instruments, including legislation, rules, regulations, and other subordinate instruments. Through such submissions, members of the public could recommend that the Commission redirect a policy initiative from one form of instrument to another, that a policy instrument be revoked for reasons of obsolescence, that the policy instrument be modified in some material respect, or that the Commission publish a policy statement or rule in a given area. For greater certainty, we recommend the inclusion of specific provisions in the Act which would allow members of the public to petition the Commission at any time to adopt, rescind or amend a rule or policy. (143a(7); 143d(14))*

*We further recommend that the Commission be statutorily required to develop and circulate a Regulatory Status Report each year. (s.143g(1)(b)) The Regulatory Status Report*

*would identify in summary fashion the status of various Commission policy initiatives. The Status Report would include the significant comments in respect of the efficacy of its instruments formally communicated to the Commission for inclusion in the Status Report during the previous twelve month period. The Status Report would be published in the OSC Bulletin.*

## **E. Statutory Enactment of a Purposes and Principles Section**

In contrast to the emerging pattern in modern legislation, the Act lacks an explicit statement of its purposes. Some of the submissions received by the Task Force recommended the enactment of a mandate section which would clarify the purposes of the statute and the nature and scope of the OSC's jurisdiction.

*We recommend the adoption of a statutory purpose clause that would define the purposes of the Act and the mandate of the Commission in fulfilling its responsibilities under the Act. (s.1(1) and (2))*

In considering the content of such a section, we had regard to the considerable jurisprudence that has developed in Ontario in respect of the Commission's mandate and the scope of its authority under the Act. Generally, the jurisprudence has evolved to recognize that the purposes of the Act are

- (a) to provide protection to investors from unfair, improper, or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in such markets to facilitate capital formation.

We recognize that although these purposes may not always be convergent when applied to specific cases or problems, they do constitute a sound set of objectives for the OSC to pursue and balance in its administration of the Act. Indeed, in the *Pezim* decision, Mr. Justice Iacobucci acknowledged that the primary goal of the framework of Canadian securities regulation is investor protection, but that did not foreclose other goals like capital market efficiency and ensuring public confidence in the system. (para. 59)

Some commentators have argued that there is little to gain from the statutory enactment of mandate clauses predicated on such broadly defined purposes. For instance, in his First Round comments to the Task Force, Professor Jeffrey MacIntosh cautioned that:

*It would be a mistake to ... state that the Commission shall foster the fairness and efficiency of Ontario's capital markets, and leave it at that. Ideas like "fairness", "efficiency", and "fostering confidence in the capital markets" are so open ended and leave so much room for interpretation that, without more, they are meaningless. (at 39)*

Although statutory purposes are not, by nature, conducive to precise definition, we believe that such statements make a tangible contribution to the public's understanding of the particular role and responsibilities of the OSC and to the nature of sound securities regulation more generally.

However, having regard to concerns respecting the content of mandate sections solely based on stated purposes, we have identified several principles that both common sense and the actual practices of the Commission dictate should be and have been used to direct and structure the OSC's interpretation of the Act's purposes in the context of specific cases, problems, and regulatory initiatives. We recognize that not every instance in which the OSC exercises its authority will implicate all of these principles. We also note that, in addition to the procedural safeguards and accountability provided for in our recommendations, the OSC is subject to judicial review should it exceed its jurisdiction.

We received considerable comment during our Second Round consultations on the content of the proposed purposes and principles section, and have undertaken appropriate revisions to our original draft to reflect several of these concerns.

*We set out below a draft of the revised purposes and principles section:*

### **"PURPOSES AND PRINCIPLES OF THE SECURITIES ACT"**

- 1(1) The purposes of this Act are:
  - (a) to provide protection to investors from unfair, improper, or fraudulent practices; and
  - (b) to foster fair and efficient capital markets and confidence in such markets so as to enhance and facilitate capital formation.
- 1(2) In pursuing the purposes of the Act, the Commission shall have due regard to the following fundamental principles:
  - (a) balancing may be required in realizing the two purposes of the Act in specific contexts;
  - (b) the principal means for achieving the purposes of this Act are requirements for ensuring the timely, accurate, and efficient disclosure of information, restrictions on fraudulent or unfair market practices and procedures, and the maintenance of high standards of fitness to ensure honest and responsible conduct by market registrants;
  - (c) effective and responsive securities regulation requires timely, open, and efficient administration and enforcement of the Act by the Commission;

- (d) the Commission should, subject to an appropriate system of supervision, utilize the enforcement capability and regulatory expertise of recognized self-regulatory organizations;
- (e) the integration of capital markets is supported and promoted by the sound and responsible harmonization and coordination of securities regulation regimes; and
- (f) business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized."

## **F. The Role of Government in Policy Development**

It is generally accepted that in our responsible system of government the Minister is accountable to the Legislature for the operation of agencies within the Ministry having delegated authority. It follows naturally from this proposition that the government as a whole has fundamental responsibility for the soundness and integrity of the policy delivered by these regulatory agencies.

Having stated, at a general level of principle, the legitimate and essential role of government in ensuring the responsible exercise of agency powers, it is far more difficult in practice to describe the way in which this goal should be effected in particular contexts. The agency's need for independence meshes only imperfectly with the government's need to ensure appropriate input and ultimately control.

In the securities context, we observe that some aspects of the OSC's relationship to the Government are well settled. There is no dispute, for instance, over the legitimacy of the Government's role in reviewing and making senior appointments so as to ensure the highest calibre of appointee, maintaining appropriate fiscal accountability and steering legislation and regulation through the Cabinet and Legislature respectively. Nor is there any dispute as to the inappropriateness of the Government's involvement in adjudicative or quasi-adjudicative matters before the Commission. Between these two poles, however, lies a vast terrain that can support a wide range of roles and responsibilities for the OSC and Government.

We recognize that, in some circumstances, tension will arise between the views held by Government and the OSC. Were it otherwise, we would have serious concern about the vitality of our public institutions and whether our public representatives were faithfully discharging their responsibilities.

### **(i) The Role of the Ministry**

It is indicative of the confusion bred by our responsible system of government that while many commentators readily concede the legitimacy of the Minister's role in securities

policy formulation, the Ministry's involvement, particularly its policy staff, is somewhat more controversial.

In meetings with the Task Force, for instance, former Chairs of the OSC commented favourably on the guidance they had received on certain fundamental policy matters from the Ministers or Deputy Ministers. Some even lamented a lack of focused political direction on some matters. Nonetheless, several declared that Ministerial staff should not be involved in the day-to-day administration of the statute. Several commentators echoed this view.

Scepticism over bureaucratic involvement in the Commission's various activities can, in part, be traced to the disparity in technical securities expertise that exists between Commission and Ministry. It is not reasonable to expect that the Government itself will or should devote its time and resources directly to the detailed regulatory activities that the modern securities market-place may require. The detailed day-to-day regulatory burden has been assigned to the OSC under the Act.

At the same time, as pointed out in other submissions, some of the matters decided by the OSC involve matters with broader implications that are the appropriate domain of the Government. For instance, in his First Round submission to the Task Force, Mr. Russell Martel stated that:

The government should play an active role in development of securities policy in Ontario for security legislation and policies are directly related to economic development in Ontario. Economic policy is too important an issue for the province to delegate to an agency such as the OSC. (at 9)

We recognize that a lead role for the Ministry in the day-to-day development of securities regulation would be inimical to the OSC's institutional identity and integrity, and would inexorably weaken the system of securities regulation in Ontario. Nevertheless, while we do not think that it is either necessary or productive for the Ministry's resources to be devoted to the detailed development of substantive securities policy, we do think that the Ministry's policy staff have an important and legitimate role to play in clarifying the Government's objectives and priorities in the securities areas (particularly when matters involving proposed legislation or matters having an inter-governmental or international aspect are involved) and, further, in ensuring that the OSC's activities are properly integrated with the activities of other delegated Ontario agencies and ministries whose operations affect capital markets. This point was not seriously contested by any party during our deliberations.

## **(ii) The Transparency of the Government's Relationship With the OSC**

We received several comments, both formal and informal, that argued for increased transparency of the relationship between Commission and Government. It is assumed that increases in transparency will provide more meaningful opportunities for public participation.

Transparency and participation are, undoubtedly, important components of a legitimate regulatory regime. Indeed, in our recommendations, we have sought at several points to devise arrangements that heighten the realization of these values in the securities context.

In this regard, while we make no independent assessment of the substantive merits of the recently enacted changes to the executive compensation regulations, we do express reservation about the transparency of both the OSC's and Governments's involvement in the development of these regulations, and the limited opportunities for public participation that were afforded. The First Round submission of Mr. Philip Anisman dealt extensively with this point:

Although the adoption of the new executive compensation disclosure rules followed the accepted model of responsibility, the process was unacceptable from the perspective of participatory lawmaking. The Commission initially invited submissions on the issue through a conceptual release ... It then announced, through a speech delivered by its chairman, that it had recommended amendments to the Government, but the speech outlined the recommendations only in general terms and the recommendations actually submitted to the Government were not published ... No further details were made public until the Minister released the new regulations. Draft regulations were not published and interested persons had no opportunity to comment on them. (at footnote 141)

The Task Force regards it as desirable that the Government's disagreement with a policy instrument formally proposed by the OSC be publicly aired. There are limits, however, on the amount of transparency that the system can or should sustain. For instance, much of the day-to-day communication between Government and the OSC involves sensitive or confidential topics, which are not suitable for public dissemination. In the view of the Task Force, were these communications placed on the public record, the capacity of the OSC and Government to forge a coherent, responsive approach to capital market regulation would be impaired.

### **(iii) Expansion of the Range of Available Instruments for Interaction and Coordination Between Commission and Government**

While we regard regular, informal communication to be a necessary prerequisite to a mature, effective relationship between any regulatory agency and government, we believe that the relationship between the OSC and the Government could be strengthened by increasing the range of formal instruments for communication and interaction.

#### **(a) Annual Statement of Priorities and Notice and Comment**

We note the possibility for meaningful government input into at least two of the processes that we have recommended elsewhere. First, we believe that the development of the Annual Statement of Priorities offers the Government a useful opportunity to convey its policy

priorities to the OSC. This input could occur prior to or concurrent with the release of the draft statement. The Government could place its statement on the public record so that the citizenry could discern more easily the implications of the Government's broader policy agenda on capital market regulation.

We suspect that participation in the development of the Annual Statement of Priorities would draw effectively on the Government's distinct strengths in articulating general policy principles and goals, while allowing the OSC the scope to determine the extent to which these values should be reflected in actual policy.

Another instrument conducive to government participation is the notice and comment process. While governments typically eschew active participation in agency notice and comment procedures, we see considerable merit in heightened government involvement in this forum. Participation in notice and comment would allow the Government to signal its discomfort with certain features of a proposed policy instrument at a stage where the OSC can most flexibly respond to articulated problems or concerns. In this way, the less desirable effects of late stage Cabinet disapproval could be averted.

#### **(b) Government Power of Initiation**

In our First Round Request for Comments, we asked the public to comment on the value of conferring an explicit direction power on the Government. Such a power would permit the Government to direct the Commission, with varying degrees of specificity, to implement a given policy initiative. The justification for a direction power is clear: it steers a middle course between the OSC's need for expertise and independence and the Government's need for political control and responsibility.

Nevertheless, there are several concerns with the way in which the direction power has been utilized in specific regulatory contexts. One risk is that the government's use of the direction power will subvert openness and accountability in agency decision-making. Another risk with the direction power is its effect on the independence of the agency. For example, in his assessment of the use of the direction power in the telecommunications context, Professor Hudson Janisch raised the concern that the direction power:

will turn the regulators into mere implementers without independent judgment. If, in fact, all that is wanted are implementers of policy, we should give up on independent regulatory agencies in favour of departmental decision-making. Therefore, directives should be confined to matters of "general policy".<sup>35</sup>

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<sup>35</sup> Hudson Janisch, "Independence of Administrative Tribunals: In Praise of 'Structural Heretics'", (1987) 1 Canadian Journal of Administrative Law and Practice at 17.

A few of the comments we received suggested that a modified direction power was a more suitable instrument for Government to utilize in the securities context. While supportive of the Government's authority to initiate the formulation of securities policy, the development of the substance of the initiative should be left to the expert and independent regulatory tribunal in the first instance. We concur and note that practicality dictates that if the Government chooses to transfer one of its regulatory and policy-making functions into an agency such as the OSC, it still should retain the ability to pursue policy initiatives or examine and address problems within the area of expertise of such agency -- and to utilize the public resources vested in such agency to accomplish these ends most efficiently.

*Accordingly, we recommend the statutory adoption of a Government power of initiation. (s.143b(1)) The power of initiation would permit the Government to compel the Commission to study and analyze a specific policy matter, remitting to the Commission the task of developing solutions. An order under the initiation power could be as broad or narrow as desired by the Government (even including a recommendation that the Commission develop a specific rule in response to the Government's guidelines) and would be placed on the public record. The power of initiation would be limited to matters of a general policy nature, and could not be used in the context of specific cases before the Commission. (s.143b(2)(a))*

#### **(iv) Ad Hoc Working Group on Financial Regulation**

During our deliberations, we noted the growing complexity of capital market regulation, and the accelerating pace of market change. Nowhere is the pace of change more apparent than in the structure and operations of financial market intermediaries. In less than a decade, we have witnessed the radical growth of some intermediaries and the rationalization and restructuring of others. Given the importance of the capital markets and related industries to the province of Ontario, we regard the development of a coherent, forward-looking approach to the capital markets industry to be of fundamental importance.

*To ensure that the Government is able to cope effectively, creatively and actively with these pressures, we recommend the creation of an Ad Hoc Working Group on Financial Regulation. The Group would be vested with the responsibility of coordinating the formulation and delivery of capital markets policy for Ontario. The Group would focus mainly on inter-governmental matters. We do not envision a very rigid or formal structure. The Group would meet quarterly or on some other periodic basis to discuss broad issues and coordinate specific policy initiatives. We would also expect that this Group could be convened on an emergency basis to respond to specific problems.*

*We recommend that the Group be chaired by the Deputy Minister of Finance (or his or her designate), and consist of the heads of each of the regulatory entities operating in the capital markets area in Ontario. The Group would be supported by the policy branch of the Ministry of Finance and, where appropriate, would draw on the staff resources available in each of the participating regulatory agencies. The Group could, where appropriate, involve*

*representatives from the leading industry self-regulatory organizations in the province or regulators from other provinces and the federal government in its deliberations.*

We note that the formation of a similar working group was proposed in 1985 by the Ontario Task Force on Financial Institutions (for essentially similar reasons), but never implemented.

## **G. The Need for Statutory Reform**

Over the past several years, the role of legislation in the system of securities regulation has declined as the role of subordinate instruments has grown in importance. During the course of our deliberations, we canvassed several different reasons for this phenomenon, none of which was entirely satisfactory.

Although we endorse flexibility in securities regulation and the use of subordinate instruments, we are not persuaded that the securities system should continue to operate without a more comprehensive legislative foundation. In our system of responsible government, the regular enactment of legislation offers the most concrete evidence of the Government's ongoing interest in and commitment to the activities of a regulatory agency.

In this regard, we are aware of salient differences between the Canadian and the American securities regimes. Where the Legislature has been involved only sporadically in the development of securities policy in Ontario, Congress has played a much more active role in the development of securities policy initiatives in the United States. In the last several decades, for instance, Congress has addressed through legislation such diverse securities topics as structural reform of the industry, international cooperation in cases of securities fraud, the manner of penny stock regulation, insider trading enforcement and the role of the EDGAR filing system. According to one commentator, the result of this involvement is the creation of a regime in which there "is a balance between respect for expertise, on the one hand, and the demand for accountability to elected officials, on the other, that gives the SEC and its political overseers mutual and reciprocal influence over the framework, or set of rules, for regulating securities."<sup>36</sup>

It is one of the great ironies of our responsible system of government that regulatory agencies are subjected to much less effective political and judicial control than regulatory agencies in the American system of separation of powers. This point was made over twenty years ago in the securities context by James Baillie:

[t]he reluctance of Legislature, Cabinet and courts to review the decisions of securities commissions has had the anomalous result that the provincial securities commissions, in a system of

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<sup>36</sup> Anne Khademan, The SEC and Capital Market Regulation: The Politics of Expertise (Pittsburgh: University of Pittsburgh Press, 1992) at 210.

responsible government, are more free of review than is the S.E.C., an independent regulatory agency.<sup>37</sup>

Although sweeping conclusions based on cross country comparisons of regulatory models should be hazarded only tentatively, we believe that differences in the legislative interest in securities regulation in Canada and the United States can in part be traced to the ongoing oversight role of two legislative committees in the United States: the House Energy and Commerce Committee and the Senate Banking Committee. These committees enjoy a small, specialized staff and have a wide range of contacts with stakeholders in the American securities community. The Committees frequently hold hearings on securities topics, initiating policy *de novo* and responding to policy proposed by the SEC.

*To encourage greater legislative involvement in Ontario, we recommend that the Chair be statutorily required to present the Annual Statement of Priorities and Regulatory Status Report to a committee of the Legislature. (s.143g(3)) In this way, the Chair could link the OSC's progress on certain key initiatives with its need for legislative support and direction. Although we recognize that annual appearances before a committee of the Legislature will not in themselves assure appropriate legislative support, we do believe that they will increase the level of legislative understanding of and commitment to the needs of affected citizens in the securities area.*

*We further recommend the statutory codification of a procedure whereby the Minister would every five years strike a Committee to review and to advise him or her on the legislative needs of the OSC. (s.143h) The findings of this review would be presented in a report to be tabled in the Legislature by the Minister. In this respect, we note the model for quinquennial ministerial review that is set out in the Quebec Securities Act (section 352). Apparently, the first two reports prepared in accordance with that obligation have succeeded in focusing legislative attention on the pressing needs of the Quebec Commission.*

## H. Resource Issues

We have struggled in our recommendations to devise principled, pragmatic, and cost-effective mechanisms for enhancing the integrity of securities policy-making. Nevertheless, the Task Force is cognizant of the fact that significant resource implications will follow from our recommendations. While several of our recommendations attempt to build on existing policy-making structures, several are new, and will require additional staff and financial resources for effective implementation. In this area, we wish to pay particular emphasis to the transitional needs of the OSC in responding responsibly and effectively to the challenges of the *Ainsley* decision. *We recommend that the Government provide appropriate interim financial assistance*

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<sup>37</sup> James Baillie, "Securities Regulation in the 'Seventies", in J. Ziegel, ed., Studies in Canadian Company Law, vol. 2 (Toronto: Butterworths, 1973) 343 at 353.

*to the OSC to ensure the rapid review and, where appropriate, reformulation of existing policy statements.*

At the same time, we would encourage the full and active support and participation of stakeholders in achieving a quick and effective resolution to the challenges posed by the *Ainsley* decision. We note that the *Ainsley* legacy is one that is not even primarily the responsibility of the current Commissioners and Staff of OSC. In this respect, we are aware that many offers of assistance have been extended by stakeholders to the OSC in respect of the *Ainsley* exercise. The legal community might assist in reformulating appropriate policy statements as rules in accordance with Commission instructions. We also envisage an important supporting role for the Securities Advisory Committee in this exercise. As stated earlier, we believe that the task of reviewing and reformulating certain existing policy statements should commence promptly.

#### **I. The Role and Responsibilities of the Chair and the Broader Community in Ensuring the Vitality and Accountability of the Commission**

There is no question that the Commission has been an extremely effective and well-respected regulatory agency. Nevertheless, without more, the Commission's past need not necessarily be prologue to its future. As William Cary observed upon his retirement as Chairman of the United States' SEC:

[R]evitalization in every government agency is needed. Continuous administration of acts involving any industry can lead to channelized thinking, loss of excitement, and with it loss of intellectually excited personnel...

How can one keep away from a run-of (mill) administration of a regulatory agency. I fear that in some eras that is about all we can anticipate. At times...the only -- indeed the highest -- goal of any agency seems to be that it conduct its day-to-day work honestly without "getting into any trouble." In a political world even that may be high praise, but it offers to the agency only a dusty road for its horizon.<sup>38</sup>

Agency vitality is a precious and fragile commodity. We believe that public deliberation and debate is the best check against agency drift as reflected in the production of mistaken, uninspired or irrelevant policy. In this respect, our proposed recommendations offer the possibility, though not the inevitability, of effective deliberation and debate. To assure success, it is obvious that these reforms require the ongoing commitment of stakeholders to informed and responsible participation in policy formulation.

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<sup>38</sup> William L. Cary, Politics and the Regulatory Agencies (New York: McGraw Hill Book Company, 1967) at 2.

If this is correct, the fundamental question is how the citizenry can be mobilized in a technically arcane area of public policy like securities regulation. Here, we wish to highlight the central role and responsibility of the Commission's Chair. As American public policy theorist Robert Reich (now United States Secretary of Labor) has elegantly and persuasively argued:

The job of the public administrator is not merely to make decisions on the public's behalf, but to help the public deliberate over the decisions that need to be made. Rather than view debate and controversy as managerial failures that make policymaking and implementation more difficult, the public administrator should see them as natural and desirable aspects of the formation of public values, contributing to society's self-understanding.<sup>39</sup>

In the context of securities regulation, we regard the Chair as subject to an ongoing responsibility to stimulate, challenge, and provoke affected citizens with a view to promoting the broadest possible participation in policy formulation. Nevertheless, without a receptive and engaged agency, intense public participation will have only a marginal effect on substantive policy. Thus, the flip-side to the Chair's public role is his or her private role in maintaining and enhancing the agency's openness and accessibility to public ideas.

We believe that only in an environment where responsible citizen debate and dissent are greeted openly and warmly by the personnel of a regulatory agency will the public spirit flourish and be able to strengthen substantive policy. In the securities context, such a regulatory environment offers the strongest assurance of capital markets remaining dynamic and efficient, thereby ensuring the continuance of one of the most important conditions for the growth and prosperity to which this province and country have long been accustomed.

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<sup>39</sup> Robert Reich, "Public Administration and Deliberation: An Interpretive Essay" (1985) 94 Yale Law Journal 1617 at 1637.



**APPENDIX I**

**PROPOSED AMENDMENTS AND COMMENTARY**



Part I of this Appendix contains the amendments proposed to the Securities Act (Ontario) to implement the recommendations of the Task Force together with a commentary on their application. Part II of the Appendix sets out an additional list of regulation/rule-making powers for consideration by the Legislature. Part III sets forth the consequential amendments to be made to the Act in connection with the implementation of the amendments proposed in Part I.

**I. PROPOSED AMENDMENTS**

1.(1) The purposes of this Act are:

- (a) to provide protection to investors from unfair, improper, or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in such markets so as to enhance and facilitate capital formation.

(2) In pursuing the purposes of this Act, the Commission shall have due regard to the following fundamental principles:

- (a) balancing may be required in realizing the two purposes of this Act in specific contexts;
- (b) the principal means for achieving the purposes of this Act are requirements for ensuring the timely, accurate, and efficient disclosure of information, restrictions on fraudulent or unfair market practices and procedures, and the maintenance of high standards of fitness to ensure honest and responsible conduct by market participants;
- (c) effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission;
- (d) the Commission should, subject to an appropriate system of supervision, utilize the enforcement capability and regulatory expertise of recognized self-regulatory organizations;
- (e) the integration of capital markets is supported and promoted by the sound and responsible harmonization and coordination of securities regulation regimes; and
- (f) business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized.

The proposed purposes and principles section attempts to define the general purposes of the Act, but requires the OSC to have regard to certain fundamental principles in achieving the Act's purposes. The investor protection and the capital market fairness and efficiency goals of securities regulation are well established in the literature, and are recognized in jurisprudence. The Task Force has indicated that the fair and efficient operation of capital markets is not an end in itself, but is designed to facilitate and enhance capital formation.

The principles enumerated in subsection 1(2) were derived from widely accepted public views respecting the role of regulation in general, and securities regulation in particular. Proposed clause (a) permits the OSC to balance the two principal purposes of the Act in particular contexts. Although investor protection and efficient and fair capital markets operation usually go hand in hand, the Task Force was of the view that tradeoffs may be required between these goals in certain circumstances, and that the Act should recognize the legitimacy of so doing.

Clause (b) sets out the standard instruments used to achieve the purposes of securities regulation. The order of enumerated instruments is intentional. Where possible, disclosure of information should always be preferred to substantive regulation in achieving the Act's purposes. Information provision permits market participants to make informed and voluntary decisions. However, the provision recognizes that, in some cases, mere disclosure is not suitable for achieving the Act's purposes, and some substantive regulation will be required. The restriction on fraud, for instance, is necessary to ensure that the information provided to market participants is honest and accurate, and thus serves as an appropriate basis for investment and business planning.

Clause (c) refers to the administration of the Act by the OSC, and requires that administration be effected in a prescribed manner. Among other goals, the provision stipulates that the administration of the Act be open and timely, which is a major theme of the Report.

Clause (d) recognizes the central role of self-regulatory organizations in a modern securities system, and the importance of the OSC making effective and appropriate use of their capability. However, this instruction is subject to the OSC being able to develop and apply an appropriate system of supervision. Ultimately, responsibility for the operation and integrity of the entire securities system resides with the OSC.

Clause (e) recognizes the international character of securities regulation and the growing integration of capital markets. Through integration, issuers and investors alike can realize valuable benefits in the form of increased opportunities for financing and investment respectively. To achieve such integration, regulatory harmonization is required. However, harmonization must be sound and responsible, and should not be undertaken merely for the sake of consistency.



Finally, clause (f) recognizes the fundamental regulatory tenet that the costs for market participants related to regulatory intervention must be proportionate to the objectives sought to be achieved. The principle is straightforward. The Task Force anticipates that this principle will direct the OSC to consider whether and how it should regulate in a certain area, particularly when other regulatory instruments and regimes (such as corporate law or professional regulation) are already in place. The provision also supports consideration of different levels of regulation to support the differential needs of investors.

143.(1) The Lieutenant Governor in Council may make regulations, and the Commission may make rules,

1. prescribing requirements in respect of applications for registration and the renewal, amendment, expiration or surrender of registration and in respect of suspension, cancellation or reinstatement of registration;
2. prescribing categories or sub-categories of registrants, classifying registrants into categories or sub-categories and prescribing the terms and conditions of registration or other requirements for registrants or any category or sub-category, including, without limiting the generality of the foregoing,
  - i. standards of practice and business conduct of registrants in dealing with their customers and clients and prospective customers and clients; and
  - ii. requirements that are necessary or advisable for the prevention or regulation of conflicts of interest;

Proposed subsection 143(1) contains a discrete list of matters with respect to which the Cabinet may make regulations and the OSC may make rules. The subsection is based, as to both form and substance, on the existing section 143 of the Act, which is now limited to regulation-making by the Cabinet. Proposed subsection 143(1) has been expanded beyond the subject matter jurisdiction embodied in the existing section 143 of the Act to include areas that, subsequent to the enactment of section 143, have been generally recognized as appropriate subjects for regulation by the OSC; many of these areas have been dealt with to this point in policy statements issued by the OSC and the Canadian securities regulators. Proposed subsection 143(1) thus regularizes the jurisdiction of the OSC.

Proposed subsection 143(10) provides that rules made by the OSC are equivalent to regulations made by the Cabinet and have the same force of law. Proposed subsection 143(11), however, establishes the primacy of the regulations over the rules in the case of inconsistency, thus confirming the primary role of Cabinet as envisaged by the Task Force. Proposed subsection 143(2) also ensures continued primacy within this model by providing Cabinet with the power to amend or repeal regulations or rules while only permitting the OSC to amend or repeal rules.

Regulations made by the Cabinet continue to be, and rules made by the OSC would be, subordinate instruments; under the scheme provided for by proposed subsection 143(1), there would be no general authority for the Cabinet or the OSC to override the statute. In certain cases, there is authority, by regulation or rule, to provide for exemptions from the requirements of the Act, the removal of exemptions under the Act, variance of the requirements of the Act; these cases are all specified. In the event that the OSC or the Government sought additional authority to override the Act by regulation or rule, it would be necessary to amend proposed subsection 143(1).

In addition to carrying forward from the existing section 143 of the Act the authorization for categorization of registrants and prescribing the terms and conditions of their registration, proposed paragraph 2 of subsection 143(1) also expressly authorizes, for greater certainty, two important terms and conditions introduced comparatively recently (1987): those relating to general standards of conduct of registrants and to regulation of conflicts of interest. Both those categories are currently the subject of regulations: see sections 221 and 222 and Part XIII of the existing regulations, respectively.

3. prescribing requirements in respect of the residence in Ontario or Canada of registrants;
4. prescribing requirements in respect of notification by a registrant or other person or company in respect of a proposed change in beneficial ownership of, or control or direction over, securities of the registrant and authorizing the Commission to make an order that any such proposed change may not be effected prior to a decision by the Commission as to whether it will exercise its powers under paragraph 1 of subsection 127(1) as a result of the proposed change;
5. prescribing requirements for persons and companies in respect of calling at or telephoning to residences for the purposes of trading in securities;

Residence in Ontario or Canada is a traditional area of securities regulation; see, for example, section 213 of the regulations and OSC Policy 4.8. The Act, however, deals only to a limited and unsatisfactory degree with residence; see section 32. Accordingly, proposed paragraph 3 of subsection 143(1) expressly creates subject matter jurisdiction for regulations and rules relating to the residence of registrants. Like many other paragraphs in this subsection, however, paragraph 3 is broadly worded, allowing the making of a wide range of rules and regulations. The appropriateness of a particular rule proposed by the OSC would be tested by the notice and comment procedure prescribed by section 143a and the Cabinet disapproval procedure established by section 143c.

Ownership restrictions relating to registered dealers have been contained since 1971 in the regulations; Part XII of the regulations sets forth the vestiges of them, which no longer provide for limits on institutional and foreign ownership.

Proposed paragraph 4 of subsection 143(1) authorizes only a very limited form of ownership restriction in relation to registrants. It permits a notification requirement and authorizes the OSC in effect to enjoin a notified change of ownership pending review by the OSC, under paragraph 1 of subsection 127(1) of the Act (as amended by Bill 134), of the continued fitness for registration of the registrant in question after giving effect to the proposed change. The type of notification procedure envisaged is, in a more limited form, currently contained in existing section 217 of the regulations.

The Act currently contains a number of provisions that in practice permit the OSC, by order, to make rules of general application. This existing form of *de facto* rule-making power is generally expressed in terms of authority in relation to a "class" of market actors or transactions. In conjunction with giving the OSC a general rule-making authority, the proposed legislation switches these existing powers of the OSC to the list of subject matter jurisdiction in proposed subsection 143(1).

One example of this switch is proposed paragraph 5 of subsection 143(1). Its source is existing subsection 37(1) of the Act, which allows the OSC to make an order in relation to any "class of persons or companies" with respect to calls at or telephoning to residences for the purpose of trading in securities. In connection with the introduction of proposed paragraph 5, the proposed consequential amendments (see Part III below) would narrow existing subsection 37(1) of the Act to limit the OSC's order-making power to "any person or company" or to individual cases.

A strong case can be made for broadening proposed paragraph 5 to permit the making of rules or regulations in relation to calls at or telephoning to business premises or other locations. Any such change would, however, have to be accompanied by a corresponding change to subsection 37(1) of the Act. Meritorious as the latter might be, the Task Force did not consider it to be within its mandate to recommend changes of this type, even where (as here) the nature of the change is unlikely to be controversial. In this sense, proposed paragraph 5 is illustrative of the general approach taken in the legislation proposed by the Task Force.

6. prescribing requirements in respect of the disclosure or furnishing of information to the public or the Commission by registrants;
7. providing for additional exemptions from the registration requirements under this Act or for the removal of exemptions from those requirements;
8. providing for exemptions from the requirements of section 41 or 42 in respect of dealers;
9. prescribing requirements in respect of the books, records and other documents required by subsection 19(1) to be kept by market participants, including, without limiting the generality of the foregoing, the form in which and the period for which the books, records and other documents are to be kept;
10. regulating the listing or trading of securities traded on recognized stock exchanges, by means of electronic or other systems or in other organized securities markets and regulating the trading of securities traded off such exchanges, otherwise than by means of such systems or outside such markets;
11. regulating recognized stock exchanges, recognized self-regulatory organizations or recognized clearing agencies, including, without limiting the generality of the foregoing, prescribing requirements in respect of the review or approval by the Commission of any by-law, rule, regulation, policy, procedure, interpretation or practice thereof;
12. prohibiting or regulating trading or advising in securities to the extent that the trading or advising is fraudulent, manipulative, deceptive or unfairly detrimental to investors;

Where the Cabinet or the OSC has a power to grant exemptions from provisions of the Act or to remove exemptions contained in the Act, this is a power to override the statute and the will of the Legislature, perhaps in significant ways. Nevertheless, traditionally the Cabinet, through its regulation-making power, and the OSC, through use of "blanket" rulings made under section 74 of the Act, have exercised this power. The existing Act provides for a scheme in this area under which the Cabinet and the OSC's exemption powers are significant but specifically enumerated; no general power to override the Act currently exists.

Proposed subsection 143(1) carries forward this approach in general. Paragraph 7 contains the authority to make rules or regulations exempting from the registration requirements of the Act and removing registration exemptions under the Act, an instance of a specific exemption-related power.

Under existing subsection 19(1) of the Act, as introduced by Bill 134, "market participants" (a newly defined term that includes registrants, issuers and others designated by the regulations) are required to keep records that are, among other things, "necessary for the proper recording of [their] business transactions and financial affairs." Although subsection 19(1) does not expressly provide for a regulation-making power in relation to the specification of the records, it appears to be a subject of appropriate OSC rule-making and hence is provided for in proposed paragraph 9 of subsection 143(1).

Proposed paragraphs 10 and 12 of subsection 143(1) contain focused but general regulation- and rule-making powers in relation to trading, replacing the arguably unlimited (and, in light of the extraordinarily wide definition of "trade", expansive) authority contained in existing paragraphs 7 and 10 of section 143 of the Act.

13. regulating trading or advising in penny stocks, including, without limiting the generality of the foregoing, by prescribing requirements in respect of additional disclosure and suitability for investment;
14. prescribing categories or sub-categories of issuers for purposes of the prospectus requirements under this Act and classifying issuers into categories or sub-categories;
15. varying the application of this Act to establish procedures for or requirements in respect of the preparation and filing of preliminary prospectuses and prospectuses and the issuing of receipts therefor that facilitate or expedite the distribution of securities or the issuing of such receipts, including, without limiting the generality of the foregoing,
  - i. requirements in respect of distribution of securities by means of a prospectus incorporating by reference other documents,
  - ii. requirements in respect of distribution of securities by means of a simplified or summary prospectus,

The *Ainsley* case, which in part prompted the creation of the Task Force, concerned the authority of the OSC to make OSC Policy 1.10 on "penny stocks". In a judgment now under appeal, the court held that the OSC lacked the authority to make that policy.

In light of the factual background, proposed paragraph 13 of subsection 143(1) deals expressly with regulations and rules relating to penny stocks, although this power would also be authorized by more general provisions of the subsection, including proposed paragraph 12.

Proposed paragraph 13 requires a definition of "penny stocks" and the consequential amendments contemplate that this would be supplied (presumably on the basis of OSC Policy 1.10) in the course of enactment of the amendments to the Act proposed by the Task Force. Although the new definition of "penny stocks" could be drafted in a wide-ranging basis so as to comprise not only what are generally considered in business terms penny stocks but also other similar, highly speculative securities, there may be merit in defining the regulation- and rule-making authority in proposed paragraph 13 in terms of "speculative securities". Depending on the definition of the latter term, this may or may not be an extension of substance beyond regulation of penny stocks; in any event, if this approach were followed, careful drafting would be required since all securities are, in a sense, speculative.

In recent years, the OSC has introduced several innovative alternative schemes of prospectus preparation and clearance that have improved the basic scheme contained in existing Part XV of the Act. Proposed paragraph 15 of subsection 143(1) authorizes the creation of such alternative procedures by regulations and rules. In particular, proposed paragraph 15 expressly clarifies the authorization for the POP System (subparagraph i), simplified prospectuses for mutual funds (subparagraph ii), the shelf prospectus procedures (subparagraph iii) and the PREP Procedures (subparagraph iv).

- iii. requirements in respect of distribution of securities on a continuous or delayed basis,
  - iv. requirements in respect of pricing of distributions of securities after the issuance of a receipt for the prospectus filed in relation thereto, and
  - v. procedures for the issuing of receipts for prospectuses after expedited or selective review thereof;
- 16. prescribing requirements for the escrow of securities in connection with distributions;
  - 17. designating activities, including the use of documents or advertising, in which registrants or issuers are permitted to engage or are prohibited from engaging in connection with distributions;
  - 18. prescribing which distributions and trading in relation thereto will be deemed to be distributions and trading outside Ontario;
- 
- 19. providing for additional exemptions from the prospectus requirements under the Act or for the removal of exemptions from such requirements;
  - 20. governing the exercise by the Commission or the Director of discretionary powers under section 61;

Although proposed paragraph 15 is also broadly drafted, it authorizes only the creation of alternative *prospectus* regimes. Another, and considerably broader, approach would be to authorize the creation of alternative regimes involving the use of other forms of offering documents, including offering memoranda. This in turn would raise further issues, including those relating to the mandatory contents of these other documents and civil liability. The Task Force considered that these questions were beyond the scope of its authority regularization mandate.

The Act contains no express guidance with respect to the vexing question of which primary offerings of securities that take place outside of Ontario are not, or are not to be treated as, distributions under the Act. Proposed paragraph 18 of subsection 143(1) creates a new regulation- and rule-making power to deal with this question. Although powers in relation to registration exemptions (proposed paragraph 7) and prospectuses (proposed paragraph 19) together permit the creation, by regulation and rule, of an exemption scheme, proposed paragraph 18 focuses more narrowly on the creation of a safe harbour of the type implemented in the United States by Regulation S made under the *Securities Act of 1933*.

Proposed paragraph 20 of subsection 143(1) authorizes regulation- and rule-making with respect to the exercise of discretionary powers under existing section 61 of the Act, a "blue sky" discretion to refuse receipts for prospectuses. This proposal recognizes the fact that, in exercising discretion in this area, the OSC has in practice developed rules. Examples of this are OSC Policy No. 5.2, which relates to junior natural resource issuers, and OSC Policy No. 5.3, which deals with real estate and mortgage investment trusts. In cases such as these, it seems desirable to reflect settled decisions of the OSC, which are in fact applied as rules, as rules or regulations made under proposed subsection 143(1).

An argument can, however, be made for the opposite approach of existing section 143 of the Act -- of not providing for any such regulation- or rule-making power. Both the intrinsic nature of the discretionary powers under section 61 and the likelihood that any rules made regarding their exercise would themselves be discretionary and hence, in the scheme proposed by the Task Force, more suitable as policies, support this view. Although,

21. prescribing requirements in respect of the preparation and dissemination and other use by reporting issuers of documents providing for continuous disclosure that are in addition to the requirements under this Act, including, without limiting the generality of the foregoing, requirements in respect of;
  - i. an annual report,
  - ii. an annual information form, and
  - iii. supplemental analysis of financial statements;

on balance, these reasons (especially in light of the past practice of the OSC) do not appear to the Task Force to preclude the granting of regulation- and rule-making authority under section 61 of the Act, they do justify the failure to provide for similar authority in relation to other discretionary powers of the OSC or the Director. For example, granting authority to make regulations or rules in relation to the exercise of the OSC's power to make cease trading orders (now under paragraph 2 of subsection 127(1) of the Act, as amended by Bill 134) appears inconsistent with an approach of assessing each possible instance of the granting of a cease trading order on its individual merits and could also (if inappropriately stretched) be used to support the creation of substantive regulatory regimes not otherwise authorized by subsection 143(1).

As a result, the Task Force envisages that the OSC would, in appropriate cases, make policies in relation to the exercise of discretionary powers other than those under section 61 of the Act. In the latter area as well, the OSC could make policies where the approach to the exercise of "blue sky" discretion had not crystallized to the point of being rule-like.

As an alternative to the approach taken by proposed paragraph 20 of subsection 143(1), it would be possible to authorize a regulation- and rule-making power in respect of specific types of offerings of securities or issuers (such as film productions, real estate syndications, junior mining and other natural resource issuers, etc.). Special types of issuers like these pose particular challenges to a securities regulatory system and are often cited as a justification for "blue sky" discretion. Implementation of such an alternative approach would, however, require either a specific list of such issuers or a non-inclusive list (perhaps qualified by a generic, "basket" definition of similar issuers that could also be regulated). In addition, such an approach would raise the issue of whether regulations and rules could impose substantive obligations on issuers (or other market participants), rather than simply providing for the denial of a receipt for prospectus.

Through OSC Policy 5.10, the OSC has introduced significant additional requirements for reporting issuers to produce an annual information form and management's discussion and analysis of financial condition and results of operations. Proposed paragraph 21 of subsection 143(1) expressly authorizes these requirements by regulation or rule as examples of a wide-ranging authority to create additional continuous disclosure obligations of reporting issuers.

22. exempting reporting issuers from any requirement of Part XVIII,
  - i. if such requirement conflicts with a requirement of the laws of the jurisdiction under which the reporting issuers are incorporated, organized or continued,
  - ii. if the reporting issuers ordinarily distribute financial information to holders of their securities in a form, or at times, different from those required by Part XVIII, or
  - iii. if the Lieutenant Governor in Council or the Commission, as the case may be, is otherwise satisfied in the circumstances that there is adequate justification for so doing;
23. requiring issuers or other persons and companies to comply, in whole or in part, with Part XVIII or regulations or rules made under paragraph 21;
24. prescribing requirements in respect of financial accounting, reporting and auditing for purposes of this Act, the regulations and the rules, including, without limiting the generality of the foregoing,
  - i. defining accounting principles and auditing standards acceptable to the Commission,
  - ii. prescribing financial reporting requirements in respect of the preparation and dissemination of future-oriented financial information and pro forma financial statements,
  - iii. prescribing standards of independence and other qualifications for auditors,
  - iv. respecting a change in auditors by a reporting issuer or a registrant, and
  - v. respecting a change in financial year of an issuer or an issuer's status as a reporting issuer under the Act;

whether by adoption of the standards of accounting bodies or otherwise;

Proposed paragraph 22 of section 143(1), like proposed paragraph 5, provides for the switching of an existing power of general application of the OSC that is exercisable by order to the list of subject matter jurisdiction for regulations and rules in proposed subsection 143(1). The source of proposed paragraph 22 is clause (b) of section 80 of the Act, a consequential amendment to which is also proposed.

Part XVIII of the Act, which contains the continuous disclosure requirements, applies to reporting issuers. Under existing paragraph 31 of section 143 of the Act, there is a regulation-making power to require compliance with that Part by other issuers. Proposed paragraph 23 of subsection 143(1) carries forward this power, augmented in relation to the additional continuous disclosure requirements authorized by proposed paragraph 21. It has been recognized that two cases in which it may be appropriate to impose continuous disclosure obligations on non-reporting issuers are those of guarantors (or other grantors of support) of debt obligations or preferred shares issued by reporting issuers and of general partners of limited partnerships that are reporting issuers.

Proposed paragraph 24 of subsection 143(1) expressly provides for a regulation- and rule-making power in relation to financial accounting, reporting and auditing, including by means of the adoption of standards of expert accounting bodies. The existing regulations already deal in part with these matters; see, in particular, subsection 1(4).

25. prescribing requirements for the validity and solicitation of proxies;
26. providing for the application of the provisions of Part XIX in respect of registered holders or beneficial owners of voting securities or equity securities of reporting issuers or other persons or companies on behalf of whom the securities are held, including by prescribing requirements for reporting issuers, recognized clearing agencies, registered holders, registrants and other persons or companies who hold securities on behalf of persons or companies but who are not the registered holders;
27. regulating take-over bids, issuer bids, insider bids and going-private transactions, including, without limiting the generality of the foregoing,
  - i. providing for exemptions in addition to those set forth in subsections 93(1) and (3) or the removal of any exemption set forth in those subsections,
  - ii. providing for exemptions from section 94 or the removal of any exemption set forth in that subsection,
  - iii. varying the requirements set forth in section 95,
  - iv. providing for exemptions from section 101, and
  - v. prescribing requirements, in respect of issuer bids, insider bids and going-private transactions, for disclosure, valuations, review by independent committees of boards of directors and approval by minority security holders;

The limited scope of proposed paragraph 25 of subsection 143(1) could be broadened in various ways, including to authorize regulation- and rule-making in relation to voting and revocation of proxies. To do so, however, would raise additional issues with respect to the appropriate role, in the area of proxy solicitation, of securities law and corporate law.

Part XIX of the Act, which deals with proxies and proxy solicitation, does not apply either to holders of equity (i.e., non-voting) securities or to beneficial owners of voting securities. OSC Policy 1.3 and National Policy 41 deal respectively with these areas, applying in whole or in part the scheme of Part XIX. Proposed paragraph 26 of subsection 143(1) permits regulation- and rule-making of the type provided for by those policies.

Proposed paragraph 27 of subsection 143(1) authorizes broad rule-making in the areas of take-over bids, issuer bids, insider bids and going-private transactions. In conjunction with this, it is proposed that as consequential amendments, definitions of "insider bid" and "going-private transaction" be inserted in the Act; OSC Policy 9.1 is a likely source for them.

Proposed paragraph 27 expressly confirms regulation-making powers currently contained in paragraph 34 of section 143 of the Act (paragraphs i-iii) and the regulatory approach of OSC Policy 9.1 in relation to issuer bids, insider bids and going-private transactions (paragraph iv). Subparagraph iv, however, does not contain a comparable authorization in relation to related party transactions and in this way departs from OSC Policy 9.1. In large part this judgment is informed by concern (which has been voiced by many in the Ontario capital markets) with respect to the appropriate scope of securities regulation in relation to corporate law. In the Task Force's view, the related party component of OSC Policy 9.1 merits specific consideration by the Legislature. Accordingly, the question of whether proposed subsection 143(1) should contain a regulation- and rule-making power in relation to related party transactions is relegated to Part II of this Appendix. It is the expectation of the Task Force that the matters listed in Part II would be reviewed by the Legislature in the course of its consideration of the enactment of the scheme proposed by the Task Force and that a decision would be taken as to whether they were or were not the appropriate subject of regulation- and rule-making.

Proposed paragraph 27 also contains a new exemption power in relation to section 101 of the Act, which mandates disclosure of acquisitions of 10 per cent or more of a class of outstanding securities. This authority is proposed in conjunction with the confirmation of a broad exemption power in relation to Part XXI of the Act, which deals with insider trading and reporting.

28. providing for exemptions from any requirement of section 76 or from liability under section 134 and prescribing standards or criteria for determining when a material fact or material change has been generally disclosed;
29. providing for exemptions from any requirement of Part XXI;
30. regulating mutual funds or non-redeemable investment funds and the distribution and trading of the securities of such funds, including, without limiting the generality of the foregoing,
  - i. varying the application of Part XV or XVIII to prescribe additional disclosure requirements in respect of such funds and prescribing or permitting the use of particular forms or types of additional offering or other documents in connection with such funds,
  - ii. prescribing permitted investment policy and investment practices for such funds and prohibiting or restricting certain investments or investment practices for such funds,
  - iii. prescribing requirements governing the custodianship of assets of such funds,
  - iv. prescribing minimum initial capital requirements for any such fund that is making a distribution and prohibiting or restricting the reimbursement of costs in connection with the organization of such fund,
  - v. prescribing various matters affecting any such fund that shall require the approval of security holders of such fund, the Commission or the Director, including, without limiting the generality of the foregoing, in the case of security holders, the level of such approval,
  - vi. prescribing requirements in respect of the calculation of the net asset value of mutual funds,
  - vii. prescribing additional requirements in respect of the content and use of sales literature, sales communications or advertising relating to such funds or the securities thereof,
  - viii. designating mutual funds as private mutual funds and prescribing requirements for private mutual funds,

Proposed paragraph 28 of subsection 143(1) permits the making of regulations and rules relating to defences to insider trading; it follows existing paragraph 30 of section 143 of the Act.

Replacing the piecemeal approach of the existing section 143 of the Act, proposed paragraph 30 of subsection 143(1) provides for a comprehensive power to make regulations and rules relating to mutual funds and non-redeemable investment funds. In a detailed list of subparagraphs, the proposed paragraph codifies the main areas of existing regulation of mutual funds under National Policy 29, National Policy 36, National Policy 39 and other OSC policies, as well as the existing regulation of non-redeemable investment funds under OSC Policy 5.3 and OSC Policy 5.4.

For the purposes of proposed paragraph 30, it is proposed that a definition of the term "non-redeemable investment fund" be added to the Act through the consequential amendments. OSC Policy 4.8 presently defines this term to include, essentially, all investment funds that are not mutual funds.

- ix. respecting sales charges imposed by a distribution company or contractual plan service company under a contractual plan on purchasers of shares or units of a mutual fund, and commissions or sales incentives to be paid to registrants in connection with the securities of a mutual fund,
  - x. prescribing the circumstances in which a planholder under a contractual plan shall have the right to withdraw from the contractual plan, and
  - xi. prescribing procedures applicable to mutual funds, registrants and any other person or company in respect of sales and redemptions of mutual fund securities and payments therefor;
31. respecting fees payable by an issuer to an adviser as consideration for investment advice, alone or together with administrative or management services provided to a mutual fund or non-redeemable investment fund;
32. prescribing additional requirements relating to the qualification of a registrant to act as an adviser to a mutual fund or non-redeemable investment fund;
33. regulating commodity pools including, without limiting the generality of the foregoing,
- i. varying the application of Part XV or XVIII to prescribe additional disclosure requirements in respect thereof and prescribing or permitting the use of particular forms or types of additional offering or other documents in connection therewith,
  - ii. prescribing requirements in respect of, or in relation to, promoters, advisers and persons who administer or participate in the administration of the affairs of commodity pools,
  - iii. prescribing standards in relation to the suitability of investors in commodity pools,
  - iv. prohibiting or restricting the payment of fees, commissions or compensation by commodity pools or holders of securities thereof and restricting the reimbursement of costs in connection with the organization of commodity pools,
  - v. prescribing requirements with respect to the voting rights of securityholders, and

Commodity pools are presently regulated under rules applicable to mutual funds as well as under OSC Policy 11.4. Proposed paragraph 33 of subsection 143(1) provides for general regulation- and rule-making authority in this area and, in a detailed list of subparagraphs, codifies the main regulatory elements of OSC Policy 11.4.

- vi. prescribing requirements in respect of the redemption of securities of a commodity pool.
- 34. respecting derivatives and varying the Act in respect thereof or any class thereof, including, without limiting the generality of the foregoing,
  - i. providing for exemptions from any provision of this Act,
  - ii. prescribing additional disclosure requirements and prescribing or prohibiting the use of particular forms or types of offering documents or other documents, and
  - iii. prescribing requirements that shall apply to mutual funds, non-redeemable investment funds, commodity pools or other issuers;
- 35. varying the application of this Act to foreign issuers to facilitate distributions, compliance with requirements applicable or relating to reporting issuers and the making of take-over bids, issuer bids, insider bids and going-private transactions where the foreign issuers are subject to requirements of the laws of other jurisdictions that the Lieutenant Governor in Council or the Commission, as the case may be, is satisfied are adequate in light of the purposes and principles of this Act;
- 36. regulating labour sponsored investment fund corporations registered under Part III of the *Labour Sponsored Venture Capital Corporations Act, 1992*, and the distribution and trading of the securities of such corporations and varying the application of the Act in respect of such corporations and, without limiting the generality of the foregoing,
  - i. prescribing proficiency requirements or additional proficiency requirements that shall apply in respect of registrants in respect of such corporations,
  - ii. prescribing or prohibiting the use of particular forms or types of offering documents for or in respect of the securities of such corporations,

Derivatives are currently the subject of wide-spread attention in financial markets and by securities and other regulators. The OSC has not yet adopted a comprehensive regulatory regime for derivatives, although certain instruments are now regulated by the Commodity Futures Act (Ontario), exchange-traded options are regulated by the Recognized Options Rationalization Order and the OSC has published for comments the results and recommendations of its Staff study relating to over-the-counter derivatives. Proposed paragraph 34 of subsection 143(1) would permit the OSC or the Cabinet to propose a regulatory regime.

Proposed paragraph 34 is very broad in its approach. First, it permits regulation of derivatives, in general, and contemplates that a definition of the term will be added to the Act through the consequential amendments. Second, proposed paragraph 34 authorizes regulations and rules that provide for exemptions from any provision of the Act, a unique departure from the general scheme of proposed subsection 143(1) of more specific exemption powers.

Through the multijurisdictional disclosure system introduced by National Policy 45 and the rules with respect to offerings by "world class" foreign issuers proposed by draft National Policy 53, Canadian securities regulators have accommodated, or propose to accommodate, foreign issuers by relaxing or otherwise varying the Canadian regulatory structure. Particularly in the case of the MJDS, reliance is placed on the securities regulatory regime of the United States and other countries. Proposed paragraph 35 of subsection 143(1) provides for a comprehensive regulation- and rule-making power with respect to foreign issuers that would authorize the regimes under MJDS and draft National Policy 53, as well as other initiatives subsequently proposed by the OSC or Cabinet.

- iii. prescribing disclosure requirements or additional disclosure requirements for or in respect of the securities of such corporations,
  - iv. exempting such corporations from specified requirements or restrictions that ordinarily apply to or in respect of mutual funds, and
  - v. prescribing insider reporting requirements for or in respect of such corporations;
- 37. prescribing requirements in respect of reverse take-overs, including, without limiting the generality of the foregoing, requirements for additional disclosure that is substantially equivalent to that provided by a prospectus;
- 38. prescribing or respecting the preparation, form, content, certification, dissemination and other use, filing and review of all documents required under or governed by this Act, the regulations or the rules and all documents determined by the regulations or the rules to be ancillary to any such documents, including, without limiting the generality of the foregoing,
  - i. applications for registration and other purposes,
  - ii. preliminary prospectuses and prospectuses,
  - iii. interim financial statements and financial statements,
  - iv. proxies and information circulars, and
  - v. take-over bid circulars, issuer bid circulars and directors' circulars;

The OSC has initiated policy-making in the area of reverse take-overs, or transactions by which a reporting issuer (usually a shell or one carrying on minimal business) acquires the business of a non-reporting issuer, issues shares to the shareholders of the non-reporting issuer and thus in effect takes the latter public; see OSC Policy 7.8 and the draft regulation contained in it. Proposed paragraph 37 of subsection 143(1) would authorize regulation- and rule-making with respect to reverse take-overs, including requiring additional disclosure of the type contemplated by OSC Policy 7.8. Proposed paragraph 37 requires a definition of reverse take-overs, which is contemplated among the consequential amendments and a proposal for which is contained in OSC Policy 7.8.

Existing section 143 of the Act contains piecemeal authorization for regulations prescribing the content of various documents required or contemplated by the Act and regulations. By contrast, proposed paragraph 38 of subsection 143(1) provides for a comprehensive regulation- and rule-making power in relation to all required documents and all documents that are ancillary to them. For purposes of illustration, some of the most important documents under the Act, including prospectuses, financial statements and take-over bid circulars, are listed in proposed paragraph 38.

39. respecting the designation or recognition of any person, company or jurisdiction where necessary or advisable for purposes of any provision of this Act, including, without limiting the generality of the foregoing,
  - i. recognizing stock exchanges, self-regulatory organizations and clearing agencies, and
  - ii. designating for purposes of subsection 88(1) the jurisdictions the requirements of the laws of which are substantially similar to the requirements of Part XIX;
40. respecting the conduct of the Commission and its employees in relation to duties and responsibilities and discretionary powers under the Act, including, without limiting the generality of the foregoing,
  - i. the conduct of investigations and examinations carried out under Part VI,
  - ii. the conduct of hearings, and
  - iii. internal administration;
41. prescribing the fees payable to the Commission, including, without limiting the generality of the foregoing, fees for filing, fees upon applications for registration or exemptions, fees for trades in securities, fees in respect of audits made by the Commission and other fees in connection with the administration of Ontario securities law; and

Existing section 143 of the Act contains a number of regulation-making powers relating to the designation or recognition of parties for specified purposes; see, e.g., paragraph 26 (exempt purchasers) and paragraph 39 (market participants). These are combined in one generic provision, proposed paragraph 39 of subsection 143(1).

42. respecting any other matter authorized by or required to implement any provision of this Act.

Existing section 143 of the Act does not contain any "basket" provision. Under proposed paragraph 42 of subsection 143(1), the Cabinet and the OSC would have a basket regulation- and rule-making authority of defined scope.

An alternative formulation of the basket provision would be one that, for example, authorized the making of rules and regulations respecting any matter that, in the opinion of the Cabinet or the OSC, was "necessary or advisable for carrying out the purposes and provisions of the Act". Basket provisions of this type are frequently found in regulation-making provisions of Ontario and federal statutes. The Task Force, however, recommends the narrower formulation of proposed paragraph 42 for a number of reasons.

First, the list in proposed paragraphs 1 to 41 of subsection 143(1) is intended to be a comprehensive one, both in terms of the number of matters listed and in terms of the scope of the rule-making authority that is provided for with respect to the listed matters. With respect to all of the basic areas of securities regulation, the regulation- and rule-making authority is very extensive, even without regard to further extension by the basket provision.

Second, although one of the central recommendations of the Task Force is that the OSC be granted rule-making authority, the Task Force is conscious of the fact that this is a significant departure from past practice in Canadian securities regulation and administrative law generally. A responsibly limited basket provision in the form of proposed paragraph 42 is, in the view of the Task Force, more consistent with the innovation of OSC rule-making than a more broadly drafted basket provision would be.

Third, it is an important, if largely implicit, component of the statutory structure recommended by the Task Force that the Legislature play a central role in determining new areas for the exercise of regulation- or rule-making authority. Periodic resort to the Legislature for amendments to subsection 143(1) is expected and desirable; far from indicating a failure of the subsection 143(1) structure, it can be evidence of the fact that it is working in an effective and responsible way. The only issue, accordingly, is striking the right balance that will lead to the involvement of the Legislature to the appropriate extent. While that is a matter of judgment, the Task Force considers that proposed paragraph 42 strikes the balance correctly.

(2) The Lieutenant Governor in Council may amend or repeal any regulation or rule and, subject to sections 143a and 143c, the Commission may amend or repeal any rule.

(3) Notwithstanding any other provision of this Act, the Commission may not assign any of its powers under subsection (1) or (2).

(4) The Commission shall not make any order or ruling of general application under any provision of this Act, including, without limiting the generality of the foregoing, section 74, that applies to a class or category of persons, companies, trades, securities or other matters or things, except by means of a rule.

(5) Where regulations or rules may be made under subsection (1) in respect of registrants, issuers, other persons or companies, securities, trades, or other matters or things, the regulations or rules may be made in respect of any class or category of registrants, issuers, other persons or companies, securities, trades or other matters or things.

(6) Any regulation or rule may authorize the granting of exemptions thereto, including exemptions granted by the Commission or the Director.

Under subsection 6(4) of the Act as amended by Bill 134, the OSC may assign its powers and duties to the Executive Director or another Director. Proposed subsection 143(3) clarifies that rule-making powers under subsection 143(1) or (2) are not assignable in this manner.

The structure proposed by the Task Force distinguishes between the various regulatory instruments available to the OSC, including rules, policies and orders or rulings. Proposed subsection 143(4) furthers this scheme of distinction by clarifying that the OSC's powers under the Act to make orders or rulings may not be used to make rules; rather, they should be limited to individual cases. In the past, the OSC has issued "blanket" rulings under section 74 of the Act that are *de facto* rules. Given the availability of a OSC rule-making power under subsection 143(1), there is no further need to rely on rulings for this purpose. In addition, continued use of blanket rulings after the enactment of the statutory recommendations of the Task Force would subvert the notice and comment scheme applicable to rule-making and would result in continued regulatory clutter and confusion.

Proposed subsection 143(5) clarifies that rules and regulations made under subsection 143(1) may apply to classes of persons specified and need not apply generally. This is consistent with existing section 143 of the Act and a general provision like subsection 143(5) simplifies the drafting of subsection 143(1).

(7) Any exemption granted, or any removal of any exemption made, by or under any regulation or rule:

- (a) may be granted or made in whole or in part;
- (b) may be granted or made subject to conditions or restrictions; and
- (c) may not provide in effect for regulation of any activity or impose any requirement not otherwise authorized by this Act or subsection (1).

(8) The Lieutenant Governor in Council may, by order, determine at any time that any regulation in force at that time shall thereafter be a rule.

In the past, exemptions from requirements under the Act and the removal of exemptions have been granted subject to restrictions and conditions and the continuation of this practice is expressly authorized by proposed clause (b) of subsection 143(7). Under the regulatory scheme proposed by the Task Force, however, these conditions or restrictions should not have the effect of substituting a regulatory regime for the one with respect to which an exemption is being granted unless there is independent authorization for this positive rule- or regulation-making; proposed clause (c) of subsection 143(7) clarifies that no regulation or rule may do so.

The conversion of existing regulations into rules, which would be permitted at the discretion of the Cabinet by proposed subsection 143(8), would enable the OSC to propose changes to the existing scheme of regulations as they are required. It is anticipated that the process of transforming various policies into rules will involve integration with what are now regulations. In addition, the exercise of the OSC's power, through rule-making, to amend the forms (e.g., those prescribing the contents of prospectuses, take-over bid circulars, etc.), which form part of the existing regulations, will be facilitated by the prior conversion of the forms into rules.

(9) All orders and rulings of the Commission in force on the day this section comes into force and listed in Part A of Schedule 1 to this Act, and all policies, or portions thereof, relating to those orders and rulings and listed in Part B of that Schedule, shall thereafter be rules for the period up to and including the day that is two years following the day on which this section comes into force.

(10) A rule has the force of law and is a regulation within the meaning of the *Regulations Act* notwithstanding any failure to comply with that Act in the making of the rule.

(11) Notwithstanding any other provision of this Act or any other Act, where the provisions of any regulation and rule conflict, the regulation shall prevail.

Under proposed subsection 143(9), existing blanket rulings of the OSC, together with related policies, would be converted into rules and those rules would be effective for a two year period. It is proposed that the blanket rulings and policies that would be converted in this way would be listed in a schedule to the Act. This proposed conversion would recognize that blanket rulings (like those in effect authorizing the POP System and MJDS) are regarded as *de facto* rules.

The two-year sunset provision applicable to rules made by conversion of blanket rulings and policies in effect requires the OSC to remake the rules within that period in order to avoid their expiration. The procedures generally applicable to rule-making, including notice and comment under proposed subsection 143a and Cabinet disapproval under proposed subsection 143c, would apply. In many instances, however, the OSC may not be required to follow the notice and comment procedure to the extent that, under proposed clause 143a(3)(d), the proposed rule makes no material change to an existing rule.

The Task Force recommends that all blanket rulings in force on the date on which the legislation comes into force, including those that have related policy statements, be converted in this way. The policy statements (to the extent tied to the blanket rulings) would also be converted. The technique of a schedule is suggested in part as a means of specifying the blanket rulings, rather than relying on a generic description.

The Task Force recognizes that, as a result of the primacy of regulations as contemplated by proposed subsection (11), there will be very significant integration required between regulations and rules at the time that requirements under existing blanket rulings and existing policy statements are elevated to rules. Given the current pattern of regulation, there will be numerous instances in which a rule created to codify a present requirement or practice will conflict with a regulation. As one example, National Policy 47 creates a prompt offering qualification system which permits the use by an issuer of an annual information form and a simplified prospectus. The requirements for a simplified prospectus differ considerably from those required by the regulations governing the form of a prospectus. Accordingly, it will be necessary to amend or repeal the regulation or otherwise convert the present regulation into a rule and amend it in order to give full effect to the provisions of the rule prescribing the contents of a simplified prospectus.

(12) References to regulations or rules in this Act, the regulations or the rules shall be deemed to include references to both the regulations and the rules, unless the context otherwise requires.

(13) For greater certainty, the Commission may make a rule in conjunction with, or jointly with, any one or more of the securities administrators of any province or territory of Canada.

143a. (1) The Commission shall publish in the *Ontario Gazette* and in its Bulletin notice of any rule which it proposes to make under section 143, which notice shall include:

- (a) a copy of the proposed rule;
- (b) a statement of the substance and purpose of the proposed rule;
- (c) a summary of the significant provisions of the proposed rule;
- (d) a reference to the authority under which the rule is proposed;
- (e) a discussion of the alternatives to the proposed rule that were considered by the Commission, if any, and the reasons for not proposing the adoption of the other alternatives considered;
- (f) a reference to any significant unpublished study, report or other written materials on which the Commission relies in proposing the rule, other than any such materials which, in the opinion of the Commission, should be held in confidence on a basis equivalent to that on which the Commission may hold materials in confidence under subsection 140(2) of this Act; and
- (g) a description of the anticipated costs and benefits of the proposed rule.

Proposed subsection (13) constitutes statutory recognition of the fact that the OSC will frequently wish to make rules affecting specific matters in conjunction with a national regulatory initiative endorsed by the Canadian Securities Administrators.

Proposed section 143a sets forth the basic OSC procedure for rule-making, and, in particular, the notice and comment procedure. Under the procedure, the OSC would be required to publish a proposed rule along with a request for comments in the OSC Bulletin and the Ontario Gazette. The public would be allowed at least 90 days to consider the proposed rule and to make any submissions to the OSC. These submissions would normally be made publicly available but, as permitted by subsection (8), the OSC, in its discretion, could treat them as confidential.

The publication requirement stipulated in proposed subsection 143a(1) calls for the OSC to supply more information than has customarily been the case to date with respect to the policy-making process. In particular, clauses (e) and (g) require a summary of the alternatives to the proposed rule that were considered by the OSC, together with the reasons for opting for the published version, as well as a description of the anticipated costs and benefits of the proposed rule. Clause (f) requires the OSC to make reference to any significant unpublished study, report or other materials on which the OSC is relying in proposing the rule (other than materials which, in the opinion of the OSC, should be held in confidence), in order that members of the public who wish to do so may familiarize themselves with these materials prior to submitting comments. The Task Force envisages that the description required by clause (f) would typically be of a qualitative nature; it is not intended to require a detailed economic impact statement with elaborate quantitative analysis.

(2) Upon publication of the proposed rule in accordance with subsection (1), the Commission shall invite, and shall afford a reasonable opportunity to, interested persons and companies to make representations in writing with respect to the proposed rule within a period of at least 90 days from the date of the publication.

(3) The Commission is not required to comply with subsections (1) and (2) if:

- (a) all persons or companies who will be subject to the rule are named, the information required by clauses (1)(a) to (g) is sent to each of them and each such person or company and any other person or company on whose interests the proposed rule is likely to have a substantial impact is afforded an opportunity to be heard with respect to the proposed rule;
- (b) the rule relates only to organizational or procedural matters internal to the Commission, and is not likely to have a substantial impact on the interests of persons or companies, other than members of the Commission or employees of the Commission, who are affected by it;
- (c) the rule grants an exemption or removes a restriction and is not likely to have a substantial impact on the interests of persons or companies other than those who benefit under it;
- (d) the rule makes no material change to an existing rule; or
- (e) the Commission believes that there are urgent reasons for the making of the rule, failing which there may be, in the opinion of the Commission, a risk of material harm to investors or to the integrity of the capital markets, and the Commission
  - (i) publishes a statement of the reasons for the making of the rule with the statement required by clause (5)(b); and
  - (ii) receives the approval of the Minister in respect of non-compliance with subsections (1) and (2) prior to publication of the rule in accordance with subsection (5).

Proposed subsection 143a(3) sets forth a discrete list of circumstances in which the OSC will not be required to submit a proposed rule to the notice and comment procedure provided for in subsections 143a(1) and (2).

Clauses (a) and (c) contemplate situations in which the benefit of the notice and comment procedure would be questionable since the proposed rule would relate to, or benefit, only a discrete group of persons or companies, rather than relating to the public as a whole. Clauses (b) and (d) contemplate circumstances in which, again, the proposed rule would be unlikely to have a broader public impact since it relates purely to internal OSC administrative matters or proposes only immaterial changes to an existing rule.

Clause (e), however, is an exception which would be available to the OSC in extraordinary circumstances. Clause (e) permits in effect the waiver of the notice and comment procedure in circumstances of urgency as evidenced by the risk of material harm to investors or the integrity of the capital markets. When read together with subsection 143c(3), this exemption allows the OSC, with the prior approval of the Minister and upon publication of the rationale for the "waiver" of the notice and comment procedure, to make a rule effective immediately for a period of nine months. The rule, accordingly, will have a limited life unless, during that period, the OSC has subjected the rule to the notice and comment procedure, as well as the disapproval procedure contemplated in subsection 143c, and the rule becomes effective as a result of that process.

(4) If, following publication of the notice referred to in subsection (1), the Commission proposes to amend a proposed rule in a material respect, the Commission shall publish in the *Ontario Gazette* and in its Bulletin the proposed rule, as amended, together with a concise statement of the purpose of the amendment and the reasons for proposing it, and shall invite, and shall afford a reasonable opportunity to, interested persons and companies to make representations in writing to the Commission with respect to the proposed amended rule within such period as the Commission determines to be appropriate.

(5) The Commission shall publish in the *Ontario Gazette* and in its Bulletin, as soon as practicable, a rule made by it, together with the following:

- (a) notice of the effective date of the rule;
- (b) a statement of the substance and purpose of the rule;
- (c) a summary of the significant provisions of the rule;
- (d) a summary of the written comments received during any comment periods contemplated in subsections (2) and (4); and
- (e) a statement of the Commission setting forth its response to the significant issues and concerns brought to the attention of the Commission during any comment periods contemplated in subsections (2) and (4) and including the reasons for any changes made to the rule following its publication as a proposed rule.

(6) The Commission may propose an amendment to a rule or the repeal of any rule and, in connection therewith, the provisions of this section 143a and section 143c shall apply, *mutatis mutandis*.

(7) Any person may petition the Commission to make, amend or repeal a rule.

Proposed subsection 143a(4) provides that if, following the publication of a proposed rule for comment but before it becomes effective, the OSC proposes to amend it in a material respect, the public should be entitled to the benefit of the notice and comment procedure with respect to the amended rule. Given, however, that there would be a substantial body of material previously available to the public as a result of the initial notice and comment procedure, the subsection does not prescribe a period of time for notice and comment in this situation but instead allows the OSC, in its discretion, to determine the appropriate time period for the additional round of consultation.

At the conclusion of the notice and comment period, proposed subsection 143a(5) requires the OSC to publish the rule as made, together with certain pertinent information in connection with it. The OSC must publish notice of the effective date of the rule, which will be determined subject to the disapproval process provided for in section 143c. In addition, the OSC must publish a summary of comments received during the notice and comment period; the expectation of the Task Force is that the time and effort necessary on the part of the OSC staff to produce such a summary would be reduced by a request, at the time of publication of the proposed rule, for commentators to provide a summary of their comments along with their written materials. Perhaps most significantly, proposed subsection 143a(5) requires the OSC to publish a statement replying to the significant issues and concerns which were raised in the notice and comment procedure and explaining the reasons for any changes, whether or not material, made to the rule following its publication as a proposed rule.

Proposed subsection 143a(6) clarifies expressly that any amendment to an existing rule or the repeal of an existing rule must be made in compliance with the notice and comment procedures set forth in section 143a (although the exceptions provided in subsection 143a(3) may apply) and the disapproval procedure set forth in section 143c. In the case of the proposed repeal of a rule, the Task Force believes that it is appropriate to require the notice and comment procedure since a rule may relieve a requirement of the Act and, as such, any proposed repeal may have a substantial effect on a class of persons or companies. The Task Force noted, for example, that the OSC has been considering for some time the possible repeal of the Blanket Ruling made with respect to the permissible securities dealing activities of financial institutions. Any such repeal would have a significant impact on the operations of such institutions, as well as their employees, agents and customers, and, accordingly, should be, and was made, subject to a notice and comment procedure.

Proposed subsection 143a(7) creates the right on the part of the public to make representations and requests to the OSC to make, amend or repeal a rule. Accordingly, it facilitates the ongoing consultative public process envisaged by the Task Force with respect to the development of securities law instruments.

(8) All written representations made under subsections (2) and (4) shall be deemed to be material filed with the Commission for the purposes of section 140.

143b. (1) The Lieutenant Governor in Council may require the Commission to study and make recommendations with respect to any matter of a general nature under or affecting the Act, the regulations or the rules, and may require the Commission to consider making a rule in respect of a matter specified by the Lieutenant Governor in Council.

(2) Notwithstanding subsection (1), the Lieutenant Governor in Council shall not require the Commission to study and make recommendations in connection with:

- (a) any specific matter in respect of a person or company in connection with which the Lieutenant Governor in Council has become aware, by notice published in the Commission's Bulletin or otherwise, of the intention of the Commission to convene a hearing, in respect of which the Lieutenant Governor in Council has become aware that any person or company has become entitled to, and has, requested a hearing, or in respect of which a hearing has been convened and is proceeding pursuant to the Act or any other law administered by the Commission; or
- (b) in respect of any specific matter in connection with which an application, investigation, examination or other process or proceeding is being undertaken pursuant to the Act or any other law administered by the Commission.

(3) Notwithstanding subsection (1), the Lieutenant Governor in Council shall not direct the Commission to adopt a specific rule having the form and content prescribed by the Lieutenant Governor in Council, but nothing in this section precludes the Lieutenant Governor in Council under subsection (1) from requiring the Commission to consider making a rule in accordance with general terms and conditions specified by the Lieutenant Governor in Council.

(4) A requirement from the Lieutenant Governor in Council under subsection (1) shall be made in writing, shall state the substance of the general matter in respect of which such study is requested, the purpose of such study and the general nature of any action to be taken by the Commission in connection therewith and shall be accompanied by any unpublished study, report or other written materials upon which the Lieutenant Governor in Council has relied in making such requirement.

(5) The Commission shall publish in its Bulletin notice of the receipt of any requirement from the Lieutenant Governor in Council pursuant to subsection (1), which notice shall include:

- (a) a statement of the substance of the general matter which is the subject of the requirement;

Proposed subsection 143a(8) extends the benefit of section 140 of the Act to written representations made by interested persons or comments in the notice and comment procedure. Accordingly, the OSC, in its discretion, may extend confidentiality to certain representations.

Proposed section 143b implements the recommendation of the Task Force to create a statutory power of initiation on the part of the Cabinet. This power would permit the Cabinet to compel the OSC to study any matter of a general nature, leaving to the OSC the task of recommending and developing solutions. The section would permit an order under the initiation power to be as broad as the Cabinet may desire, including a requirement that the OSC consider making a rule in respect of a particular matter, but it would not permit the Cabinet to direct the OSC to adopt a specific rule in the form provided by the Cabinet. Within the statutory framework proposed by the Task Force, the Cabinet would implement by regulation any specific form and content determined by it. Proposed subsection (5) ensures that the use by the Cabinet of this power of initiation would be a matter of public record through the requirement to publish receipt of the requirement from the Cabinet together with pertinent details which would allow the public to inform themselves sufficiently with respect to the matter.

- (b) a statement of the purpose of the requirement; and
  - (c) a reference to any unpublished study, report or other written materials delivered in accordance with subsection (3), other than such materials which the Lieutenant Governor in Council has requested that the Commission treat as confidential.
- 143c. (1) A copy of a rule made by the Commission accompanied by
- (a) a copy of the material published pursuant to subsection 143a(1) and any document referred to therein;
  - (b) a summary of the written representations made and other documents submitted by interested persons and companies pursuant to subsection 143a(2) and subsection 143a(5);
  - (c) a transcript of any oral presentation made in relation to the making of the rule and of any oral representation presented;
  - (d) any other material information that was considered by the Commission in connection with the making of the rule; and
  - (e) a copy of the material published pursuant to subsection 143a(6),

shall be sent to the Minister within seven days of the date on which the Commission approves the rule.

(2) A rule shall become effective on a date specified by the Commission, which date shall be no less than 75 days after the Commission approves the rule, unless within 60 days after the Commission approves the rule, the Minister determines that the proposed rule should be considered by the Lieutenant Governor in Council and the Lieutenant Governor in Council

- (a) declares in writing that the rule shall not become effective;
- (b) returns the rule to the Commission for further consideration; or
- (c) amends the proposed rule in accordance with subsection (6).

Proposed subsection 143c provides for the final steps in the rule-making process following the completion of the notice and comment procedure. The OSC must deliver the rule, together with relevant materials relating to it, to the Minister within seven days after the date on which the OSC approves the rule and, thereafter, it is subject to the Cabinet disapproval process envisaged by the Task Force. The Minister will review the proposed rule to assess whether it should be referred to the Cabinet for consideration. If the Minister determines so to refer the rule, the Cabinet will have 60 days to disapprove any rule. A rule not explicitly disapproved within that period will become effective on the date specified by the OSC but, in any event, not until at least 15 days following the expiration of the disapproval period. Proposed subsection 143c(4) requires the OSC to publish in the Ontario Gazette and in the OSC Bulletin notice of the expiration of the disapproval period or, in the event that Cabinet exercises its power to disapprove a rule, notice of any such action.

If Cabinet disapproves a rule in accordance with the provisions of proposed subsection 143c(2), the Cabinet may return the rule to the OSC for further study and, in that event, the process which follows would be at the discretion of the OSC and may vary depending upon the nature of Cabinet's instructions. The Cabinet may also amend a rule within the disapproval period as provided in subsection (6).

(3) Where a rule is made by the Commission without compliance with subsections 143a(1) and (2) for reasons of urgency as contemplated in clause (e) of subsection 143a(3), the effective date of the rule for purposes of subsection (2) shall be the date of publication of such rule in the Commission's Bulletin or such other date thereafter as may be specified by the Commission; provided, however, that such rule shall be deemed to be repealed and to have no further force or effect on the date which is nine months following the initial effective date specified for such rule, unless, on or prior thereto, the rule has been published in compliance with subsections 143a(1) and (2) and has become effective in accordance with subsections (1) and (2) of this section.

(4) The Commission shall publish in the *Ontario Gazette* and in its Bulletin:

- (a) notice of the expiry of the applicable period referred to in subsection (2) with respect to each rule made by the Commission in accordance with subsection 143a(5); or
- (b) notice of any action of the Lieutenant Governor in Council pursuant to subsection (2) in respect of any proposed rule.

(5) Notwithstanding subsection 143b(5), the Commission shall not be required to publish a further proposed rule prepared following the return of the original proposed rule under paragraph (2)(b).

(6) The Lieutenant Governor in Council may amend a rule sent to it pursuant to subsection (1) within the period provided in subsection (2) and the rule as so amended shall become effective on the date specified by the Lieutenant Governor in Council.

143d. (1) For purposes of this Act a policy is a statement:

- (a) of the principles, standards, criteria or factors that will influence a decision or exercise of discretionary authority by the Commission or the Director under this Act, the regulations or the rules;
- (b) as to the manner in which a provision of this Act, the regulations or the rules is interpreted or applied by the Commission or the Director; or
- (c) as to the practices generally followed by the Commission or the Director in the performance of duties and responsibilities under this Act.

(2) The Commission may adopt a policy in furtherance of the purposes and principles of this Act as set forth in section 1.

(3) For greater certainty, the Commission may adopt a policy in conjunction with, or jointly with, any one or more of the securities administrators of any province or territory of Canada.

Proposed subsection 143c(3) permits the OSC to make a rule effective immediately for a period of nine months in circumstances in which the notice and comment procedure has been "waived" on grounds of urgency, as contemplated in subsection 143a(3)(e). As noted in the commentary to that subsection, the rule will have a limited life unless it has otherwise in that time period become effective through the regular procedure for rule-making.

In addition to the express power to disapprove a rule, proposed subsections 143c(5) and (6) also create a power in the Cabinet to amend a rule within the disapproval period. In the event that the Cabinet exercises its power to do so, the OSC would not be required to remit the subject matter of Cabinet's instructions or its proposed amendment to a further notice and comment period. In this case, the rule, as amended, would become effective on the date specified by the Cabinet.

Proposed section 143d codifies the nature of policy statements and confirms the authority on the part of the OSC to formulate and apply policy statements. Subsection (1) in particular defines policies with respect both to their content and their use. First, policies deal with the making of decisions (a term defined broadly in the Act, as amended by Bill 134), the exercise of discretionary powers, interpretation and administrative practices. Second, policies are principles that will "influence" the OSC. Subsection (1) not only provides a positive definition of policies but, equally importantly, it establishes the primary basis for distinguishing policies from rules. As a result, it should guide the OSC in determining, in a given case, whether it should proceed by rule or by policy.

Subsection (11) expressly confirms that policy statements are non-binding and do not have the force of law.

(4) The Commission shall not adopt a policy that, by reason of its mandatory or prohibitory character or otherwise, is properly a rule.

(5) The Commission shall publish in its Bulletin notice of the proposed adoption of any policy, which notice shall include:

- (a) a copy of the proposed policy;
- (b) a statement of the purpose of the proposed policy;
- (c) a summary of the significant provisions of the proposed policy;
- (d) a reference to the provision of this Act, the regulations or the rules to which the proposed policy relates; and
- (e) a reference to any significant unpublished study, report, decision or other written materials on which the Commission relies in proposing the policy, other than any such materials which, in the opinion of the Commission, should be held in confidence on a basis equivalent to that on which the Commission may hold materials in confidence under subsection 140(2) of this Act.

(6) Upon publication of the proposed policy in accordance with subsection (5), the Commission shall invite, and shall afford a reasonable opportunity to, interested persons to make representations in writing with respect to the proposed policy for a period of at least 60 days from the date of publication.

(7) The Commission is not required to comply with subsections (5) and (6) if:

- (a) the proposed policy relates only to organizational or procedural matters internal to the Commission, and is not likely to have a substantial impact on the interests of persons, other than members of the Commission or employees of the Commission, who are affected by it; or
- (b) the proposed policy, if adopted, would make no material substantive change to an existing policy.

(8) If, following publication of the notice referred to in subsection (5), the Commission proposes to amend a proposed policy in a material respect, the Commission shall publish in its Bulletin the proposed policy, as amended, together with a concise statement of the purpose of the amendment and the reasons for proposing it, and shall invite, and shall afford a reasonable opportunity to interested persons, to make representations in writing to the Commission with respect to the proposed amended policy within such period as the Commission determines to be appropriate.

Supplementing proposed subsection 143d(1) in distinguishing between rules and policies, proposed subsection 143d(4) expressly prohibits the OSC from adopting a policy that is, in its legal character, a rule. This subsection is not intended, however, to limit the ability of the OSC to make policy as contemplated in this section within the subject areas specified in subsection 143(1).

Proposed subsections 143d(5) and (6) set forth the notice and comment procedure which must be followed by the OSC with respect to the making of policy statements. It is very similar to the process for rule-making, although under proposed subsection (6) the mandatory length of the notice and comment period in the case of policies is shortened from 90 days to 60 days. In addition, the exceptions provided for in proposed subsection (7) from the requirement to subject policies to the notice and comment procedure are limited when compared to those for rules; in particular, there is no exception for urgency as in proposed clause (e) of subsection 143a(3). Because policy is, unlike rules, non-binding, at the conclusion of the notice and comment period, the OSC may, under proposed subsection (9), determine the effective date for a policy without any requirement to subject the policy to a Cabinet disapproval process comparable to that for a rule made by the OSC.

(9) The Commission shall publish in its Bulletin, as soon as practicable, a policy made by it, together with the following:

- (a) a summary of the significant provisions of the policy, and a statement of its substance and purpose;
- (b) a reference to the provision of this Act, the regulations, the rules or such other matter to which the proposed policy relates;
- (c) a summary of the written comments received during the initial and subsequent comment periods contemplated in subsections (6) and (8);
- (d) a statement of the Commission setting forth its response to the significant issues and concerns brought to the attention of the Commission as a result of the written comments received during any comment periods contemplated in subsections (6) and (8) and including the reasons for any changes made to the policy following its publication as a proposed policy; and
- (e) notice of the date of adoption of the policy.

(10) The failure to adopt a policy in respect of any matter or the publication of a proposed policy does not limit the Commission's authority to exercise its discretion in the public interest in any proceeding or application under this Act or any other law administered by the Commission.

(11) A policy adopted by the Commission is not a rule or a regulation within the meaning of the this Act or the *Regulations Act* and does not have the force of law.

(12) If the Commission proposes to amend or rescind a policy adopted by it, the provisions of this section shall apply, *mutatis mutandis*.

(13) Notwithstanding any other provision of this Act, the Commission shall not assign its power to adopt, amend or rescind a policy.

Proposed subsections 143d(10) and 143d(11) reflect traditional principles of administrative law with respect to policy, as distinct from rules or regulations. With respect to subsection (10), in particular, the Task Force believes that, while the discretion of the OSC should not be fettered in any way by a policy which has been proposed but not yet made, there is an issue as to whether the Commission's discretion in any case should or should not be fettered by a policy which has been made. For this reason, proposed subsection (10) leaves this issue to be resolved, in any particular circumstance, by the application of legal principles appropriate to such circumstance.

It is possible that the rescinding of a policy may have a detrimental effect on market participants. Accordingly, proposed subsection (12) retains the notice and comment procedure in this context.

The prohibition on the OSC's authority to assign its power under proposed subsection 143d(13) is not intended to limit or otherwise change the function that the Director has traditionally performed in connection with policy-making. The Task Force anticipates that the Director will continue to play a key role in terms of consideration and initiation of policy. Ultimately, however, the OSC must authorize the making of any policy.

- (14) Any person may petition the Commission to adopt, amend or rescind a policy.
- (15) All written representations made under subsections (6) and (8) shall be deemed to be material filed with the Commission for the purposes of section 140.
- (16) No policy adopted by the Commission prior to the day this section comes into force is invalid solely by reason of its adoption by the Commission prior to that day or of the failure to comply with subsection (5), (6), (7) or (8).
- 143e. (1) The Commission may cooperate with:
- (a) her Majesty in right of Canada or any province or territory of Canada or any government of any other country; or
  - (b) any agency of the Government of Ontario or any agency of any other government that exercises regulatory authority under statute over securities transactions or markets, commodities transactions or markets or financial institutions,

in connection with the enforcement or administration of the laws administered by the government, the agency or the Commission, and in furtherance of such cooperation, may enter into an agreement or memorandum of understanding.

(2) The Commission may enter into an agreement or memorandum of understanding with any person or company in respect of any settlement in connection with the enforcement by the Commission of the laws administered by it but the Commission may not enter into any other agreement or memorandum of understanding with any market participant, including, without limiting the generality of the foregoing, any recognized self-regulatory organization, in connection with the enforcement or administration of Ontario securities law or any other law administered by the Commission.

(3) For the purposes of subsection (1), an agency of a government other than the Government of Ontario includes a self-regulatory organization or clearing agency that is recognized as such by that government or an agency of that government.

(4) A copy of an agreement or memorandum of understanding made by the Commission in accordance with subsection (1), other than an agreement or memorandum of understanding made with the Minister, shall be published in the Commission's Bulletin and sent to the Lieutenant Governor in Council within seven days of the date on which the Commission approves the agreement or memorandum of understanding.

(5) An agreement or memorandum of understanding shall become effective on a date specified by the Commission, and, in the case of any agreement or memorandum of understanding published pursuant to subsection (4), such date shall be not less than 45 days after the Commission approves the agreement or memorandum of understanding, unless within such time the Lieutenant Governor in Council:

Proposed section 143e provides specific authorization for the OSC to enter into agreements and non-binding memoranda of understanding with certain financial service and securities regulatory authorities, including self regulatory organizations (except those it regulates), and with persons or companies in connection with settlements. The section restricts, however, the scope of such agreements to matters relating to the enforcement or administration of the laws administered by the government, the agency or the OSC.

Proposed subsections 143e (4) and (5) create a power on the part of the Cabinet to disapprove an agreement or memorandum of understanding, other than one relating to a settlement of an enforcement issue with a person or company or one made between the OSC and the Minister. The period during which such disapproval must occur runs for 45 days following approval of the agreement or memorandum of understanding by the OSC. The power of Cabinet is limited, for practical reasons, to the power to disapprove the agreement or memorandum of understanding rather than to a broader power to amend such an agreement or memorandum of understanding unilaterally. In the event of Cabinet disapproval, the process which follows is left to the discretion of the OSC and may depend upon instructions received from the Cabinet.

- (a) declares in writing that the agreement or memorandum of understanding shall not become effective; or
    - (b) returns the agreement or memorandum of understanding to the Commission for further consideration.
  - (6) The Commission shall publish in its Bulletin:
    - (a) notice of the expiry of the 45 day period referred to in subsection (5) with respect to each applicable agreement or memorandum of understanding made by the Commission; or
    - (b) notice of any action of the Lieutenant Governor in Council pursuant to subsection (5) with respect to any proposed agreement or memorandum of understanding.
  - (7) An agreement or memorandum of understanding made in accordance with this section 143e is not a rule or regulation within the meaning of the *Regulations Act*.
  - (8) No agreement or memorandum of understanding made or entered into by the Commission prior to the day this section comes into force is invalid solely by reason of its being made or entered into prior to that day or of the failure to comply with subsection (4), (5) or (6).
- 143f. The provisions of section 122 of the Act shall not apply to any statement made by or on behalf of any person or company in any representations made or given to the Commission pursuant to section 143a or 143d.
- 143g. (1) The Commission shall, on or before ■, 199■, and each year thereafter, within ■ days of the end of its financial year, prepare and deliver to the Minister, and publish in its Bulletin:
- (a) a statement of the Chair of the Commission setting forth the proposed priorities of the Commission in connection with the administration of the Act, the regulations and the rules, together with a summary of the reasons for the adoption of such priorities; and
  - (b) a report relating to the prior twelve-month period which shall contain, in summary form, a description of each rule or policy, and each agreement or memorandum of understanding published pursuant to subsection 143e(4), that was made, adopted, amended, repealed or rescinded, as applicable by the Commission, during such period, together with a summary of the significant representations made by any persons or companies in connection with petitions received by the Commission during such period under section 143a or section 143d.

The process in connection with the disapproval procedure is similar to that for rules. The OSC will be required to publish notice of the expiry of the disapproval period in its Bulletin or notice of any action taken by the Cabinet in the event that the disapproval power is exercised.

Proposed section 143f clarifies that the liability provisions in section 122 of the Act, as amended by Bill 134, will not apply to statements made by persons or companies in connection with representations made or given in the course of the notice and comment procedure.

Proposed section 143g creates a specific requirement for publication of an Annual Statement of Priorities and a Regulatory Status Report. Subsection (2) is intended to ensure the ability of the public to participate in the development of the Annual Statement of Priorities by requiring the OSC to invite public participation in this process.

(2) The Commission shall, at least ■ days prior to the intended date of publication of the statement referred to in subsection (1), publish a notice in its Bulletin which shall invite interested persons to make representations in writing as to the matters which should be identified as priorities in such statement, and all such representations shall be deemed to be material filed with the Commission for the purposes of section 140 of the Act.

(3) As soon as practicable following delivery of the materials referred to in subsection (1), the Minister shall convene such committee of the Legislature as the Minister shall designate to consider the advisability, in connection therewith, of amending the Act, and to hear the opinions of interested persons and companies.

143h. (1) The Minister shall, on or before ■, 199■, and every five years thereafter, make a report to the Legislature on the effectiveness of this Act and the advisability of amending it.

(2) As soon as practicable following the delivery of the report referred to in subsection (1), the Minister shall convene such committee of the Legislature as the Minister shall designate to consider the effectiveness of this Act and the advisability of amending it, and to hear the opinions of interested persons and companies in connection therewith.

Proposed section 143h creates a statutory procedure by which the Minister, every five years, would strike a committee to review and to advise him or her in connection with the effectiveness of, and the need to amend, the Act. This is expected to facilitate the OSC's presentation to the Legislature of its views with respect to the Act, including the need to amend it.

**II. ADDITIONAL LIST OF REGULATION/RULE-MAKING  
POWERS FOR CONSIDERATION BY LEGISLATURE**

- prescribing additional requirements in respect of market participants, including, without limiting the generality of the foregoing,
  - i. requirements in respect of the disclosure or furnishing of information to the public or the Commission by market participants,
  - ii. requirements in respect of membership in a self-regulatory organization, and
  - iii. requirements in respect of take-over bids, issuer bids, insider bids, going-private transactions and related party transactions;
- respecting defensive tactics in response to take-over bids;

Proposed subsection 143(1), which defines in a list of specific items the subject matter for rule-making by the OSC and regulation-making by the Cabinet, reflects the conclusion of the Task Force that this jurisdiction is generally uncontroversial. In the course of the drafting of subsection 143(1), however, the Task Force identified certain matters the inclusion of which in the subsection 143(1) list would be viewed, at least by some in the Ontario capital markets, as controversial. The Task Force did not see its mandate as including the determination of the proper treatment of these possibly controversial matters, either by accepting them (through inclusion in the subsection 143(1) list) or by rejecting them (through exclusion from that list). Rather, the Task Force determined that it should bring these possibly controversial matters to the attention of the Legislature with the recommendation that the Legislature resolve their proper treatment in the course of considering the legislative implementation of the Task Force's recommendations.

The three possibly controversial matters identified by the Task Force are: a general rule- and regulation-making authority with respect to market participants; defensive tactics in response to take-over bids; and related party transactions.

With respect to market participants, proposed paragraph 9 of subsection 143(1) contains a limited rule- and regulation-making authority with respect to records of those parties. Arguably, it would be appropriate to extend that authority, particularly in light of the broad application of the Act, as amended by Bill 134, to market participants. Bill 134, however, proposed no such regulation-making power; it simply provided for authority to designate a person or company as a market participant, which is specifically contemplated by the definition of that term. In addition, the significant change made by the extension of the regulatory focus of the Act and the OSC in a general way beyond registrants and issuers suggests that it is the Legislature that is the appropriate body to consider any broad rule- and regulation-making authority in this area.

Under proposed paragraph 27 of subsection 143(1), the Cabinet has broad regulation-making power, and the OSC has broad rule-making power, with respect to take-over bids. That authority is not expressly extended to establishing requirements with respect to defensive tactics in response to take-over bids. Although National Policy 38 deals in a limited way with this matter, it remains controversial for a number of reasons, including those of policy and the appropriate relationship of securities law and corporate law.

- prescribing, in respect of related party transactions having a material effect on reporting issuers, requirements equivalent to the requirements prescribed pursuant to subparagraph v of paragraph 27;

### III. CONSEQUENTIAL AMENDMENTS

Subsection 1(1) would be amended by adding definitions of the following terms:

- (a) derivatives;
- (b) future-oriented financial information;
- (c) going private transaction;
- (d) insider bid;
- (e) non-redeemable investment fund;
- (f) penny stocks; and
- (g) reverse take-overs.

In addition, the following technical consequential amendments that relate to the draft legislation in Part I would also be made:

1. Section 37 is amended by striking out "or class of persons or companies" in each place it appears.
2. Clause (b) of section 80 is amended by striking out "or class of reporting issuers" in each place it appears and by striking out "or their" in the fifteenth line.
3. Subsection 118(3) is amended by striking out "or a class of portfolio managers" in the second and third lines and "or class of portfolio managers" in the ninth and tenth lines.
4. Subsection 121(2) is amended by striking out "class of persons or companies or class of transactions" in the nineteenth and twentieth lines.

Proposed paragraph 27 of subsection 143(1), which, in addition to dealing with take-over bids, also authorizes the regulation of issuer bids, insider bids and going-private transactions on a basis consistent with OSC Policy 9.1, departs from that Policy in not expressly authorizing rule- and regulation-making with respect to related party transactions. If the Legislature were to determine that rule- and regulation-making with respect to related party transactions is appropriate, proposed paragraph 27 could be revised to apply to related party transactions. In addition, it would be open to the Legislature to determine that certain specified related party transactions - for example, those that are equivalent to going-private transactions but are not so classified under the definition of that term - are the appropriate subject matter of rule- or regulation-making.

Implementation through legislation of the recommendations of the Task Force will involve a certain number of consequential amendments to the Act.

Proposed paragraphs 13, 24, 27, 30, 31, 32, 34 and 37 of subsection 143(1) require the insertion into the Act of related definitions.

In addition, subsection 143(1) now authorizes rule- and regulation-making in relation to classes of persons and companies, securities or other matters that are now contained in the Act. This requires amendment of the Act to remove existing powers of the OSC to make rules by order.



**Schedule 1<sup>1</sup>*****Part A***

Blanket Ruling	Date Issued
In the Matter of Certain Reporting Issuers ( <i>Order</i> )	April 10, 1980
In the Matter of the Automatic Investment of Dividends or Distributions in Shares or Units of Mutual Funds ( <i>Ruling</i> )	May 11, 1983
In the Matter of Certain Proposed Amendments ( <i>Order</i> )	October 19, 1983
In the Matter of Discount Brokerage and the Role of Financial Institutions ( <i>Order</i> )	January 10, 1984
In the Matter of Order Execution Access Dealers ( <i>Order</i> )	February 10, 1984
In the Matter of Certain Reporting Issuers ( <i>Order</i> )	April 27, 1984
In the Matter of Certain Reporting Issuers ( <i>Order</i> )	July 24, 1984
In the Matter of Zero Coupon Strip Bonds ( <i>Ruling</i> )	September 25, 1984
In the Matter of Eurosecurity Financings ( <i>Ruling</i> )	November 22, 1984
In the Matter of Trades in Securities of a Private Company Under the <i>Execution Act</i> ( <i>Ruling</i> )	January 4, 1985
In the Matter of Certain Reporting Issuers ( <i>Order</i> )	July 12, 1985
In the Matter of the Mandatory Investment of Dividends or Distributions in Shares or Units of Mutual Funds ( <i>Ruling</i> )	October 16, 1985
In the Matter of a Policy of the Toronto Stock Exchange on Small Shareholder Selling and Purchase Arrangements ( <i>Ruling</i> )	March 2, 1987
In the Matter of a Policy of the Montreal Exchange on Small Shareholder Selling and Purchase Arrangements ( <i>Ruling</i> )	August 18, 1987
In the Matter of Certain Proposed Amendments ( <i>Order</i> )	September 22, 1987

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<sup>1</sup>This information has been compiled as of June 30, 1994.

Blanket Ruling	Date Issued
In the Matter of Certain Proposed Amendments to the Securities Act ( <i>Ruling and Order</i> )	October 26, 1987
In the Matter of the <i>Business Corporations Act</i> , 1982, S.O. 1982, Chapter 4, as amended ( <i>Designation</i> )	November 25, 1987
In the Matter of Trading in Recognized Options Cleared Through Recognized Clearing Organizations ( <i>Order and Ruling</i> )	December 1, 1988
In the Matter of the <i>Securities Act</i> , R.S.O. 1980 Chapter 466, as amended ( <i>Order</i> )	July 7, 1989
In the Matter of the Toronto Stock Exchange ( <i>Ruling</i> )	July 12, 1990
In the Matter of Self-Directed Registered Education Savings Plans ( <i>Ruling</i> )	October 22, 1990
In the Matter of the Toronto Stock Exchange ( <i>Recognition Order</i> )	February 27, 1991
In the Matter of the Recognized Options Rationalization Order ( <i>Order</i> )	April 30, 1991
In the Matter of an Assignment to the Director Pursuant to Section 6 of the <i>Securities Act</i> . ( <i>Decision</i> ).	June 25, 1991.
In the Matter of First Prospectuses Filed by National Policy Statement No. 36 Mutual Funds, and in the Matter of Universal Money Market Fund ( <i>Order</i> )	July 3, 1991
In the Matter of Mutual Fund Securities ( <i>Order</i> )	July 24, 1991
In the Matter of the Recognized Options Rationalization Order ( <i>Order</i> )	August 14, 1991
In the Matter of Self-Directed Registered Education Savings Plans ( <i>Order</i> )	December 5, 1991
In the Matter of Certain Members of the Toronto Stock Exchange ( <i>Ruling</i> )	July 14, 1992

Blanket Ruling	Date Issued
In the Matter of the Limitations on a Registrant Underwriting Securities of a Related Issuer or Connected Issuer of the Registrant ( <i>Order</i> )	July 30, 1992
In the Matter of Going Private Transactions ( <i>Order</i> )	June 30, 1993
In the Matter of Insider Bids, Issue Bids and Take-Over Bids in Anticipation of Going Private Transactions ( <i>Order</i> )	June 30, 1993
In the Matter of Real Return Bond Strip Bonds ( <i>Ruling</i> )	November 23, 1993
In the Matter of Dividend Reinvestment and Stock Dividend Plans ( <i>Ruling and Order</i> )	November 26, 1993
In the Matter of Ontario Regulation 638/93 and the Disclosure of Executive Compensation and of Indebtedness of Executive Officers and Senior Officers ( <i>Order</i> )	December 1, 1993
Blanket Permission Under s.81 of the Regulation Under the <i>Securities Act</i> (Ontario) ( <i>Blanket Permission</i> )	December 1, 1993
Blanket Permission — International Offerings Made by Way of Private Placement in Ontario — ss.38(3) ( <i>Blanket Permission</i> )	December 1, 1993
In the Matter of Regulation 1015 R.R.O. 1990, As Amended, and in the Matter of Certain International Offerings by Private Placement in Ontario ( <i>Ruling</i> )	December 1, 1993
In the Matter of Certain Amendments to Regulation 1015 of the R.R.O., 1990 Made Under the <i>Securities Act</i> ( <i>Ruling</i> )	December 14, 1993 (and predecessors)
In the Matter of Networking Arrangements Governed by the Principles of Regulation ( <i>Order</i> )	December 15, 1993
In the Matter of a Proposal of the Toronto Stock Exchange to Foster Capital Formation for Junior Resource and Industrial Enterprises ( <i>Ruling</i> )	January 10, 1994
In the Matter of Dividend Reinvestment Plans ( <i>Ruling</i> )	March 2, 1994

Blanket Ruling	Date Issued
In the Matter of Ontario Regulation 638/93 and the Disclosure of Executive Compensation and of Indebtedness of Executive Officers and Senior Officers ( <i>Order</i> )	March 8, 1994
Blanket Permission Under s.81 of the Regulation Under the <i>Securities Act</i> (Ontario) ( <i>Blanket Permission</i> )	March 8, 1994
In the Matter of Trades By Issuers in Connection With Securities Exchange Issuer Bids and In the Matter of Trades By Holders of Securities of a Company to Another Company in Connection With an Amalgamation, an Arrangement or a Specified Statutory Procedure ( <i>Ruling</i> )	April 20, 1994
In the Matter of Trades By Issuers in Options to Senior Officers and Directors ( <i>Ruling</i> )	April 26, 1994
In the Matter of the First Trade in Securities Acquired Pursuant to Certain Exemptions ( <i>Ruling and Order</i> )	April 26, 1994
In the Matter of Trades by Issuers Upon Exercise of Certain Conversion or Exchange Rights and In the Matter of the First Trade in Securities Acquired Upon Exercise of Such Conversion or Exchange Rights ( <i>Ruling</i> )	June 7, 1994

### ***Part B***

Blanket Ruling and Related Policy Statement	Date Issued
In the Matter of a Simplified Prospectus Qualification System for Mutual Funds ( <i>Ruling</i> ) [including National Policy Statement No. 36]	December 18, 1984
In the Matter of Certain Reporting Issuers ( <i>Order</i> ) [including National Policy Statement No. 41].	March 1, 1988
In the Matter of Rules for Shelf Prospectus Offerings and for Pricing Offering after the Prospectus is Received ( <i>Ruling</i> ) [including National Policy Statement No. 44] .	May 2, 1991

Blanket Ruling and Related Policy Statement	Date Issued
In the Matter of the Multijurisdictional Disclosure System ( <i>Ruling and Order; Exemption</i> ) [including National Policy Statement No. 45]	June 24, 1991
In the Matter of the Prompt Offering Qualification System ( <i>Ruling and Orders; Waiver</i> ) [including National Policy Statement No. 47]	February 17 & 25, 1993
In the Matter of National Policy Statement No. 47 and the Solicitation of Expressions of Interest ( <i>Ruling and Order</i> ), [including National Policy Statement No. 47.]	June 9, 1993
In the Matter of Certain Trades in Securities of Junior Resource Issuers ( <i>Ruling and Order</i> ) [including Ontario Policy No. 5.2]	March 30, 1988
Proposed Blanket Ruling and Related Policy Statement respecting Foreign Issuers	Not yet issued
Proposed Blanket Ruling and Related Policy respecting Over-the-Counter Derivatives	Not yet issued



## **APPENDIX II**

### **REQUEST FOR COMMENTS - FIRST ROUND**



## PROVINCE OF ONTARIO TASK FORCE ON SECURITIES REGULATION

### REQUEST FOR COMMENTS - FIRST ROUND

On October 7, 1993, Ontario Finance Minister Floyd Laughren announced the formation of a joint Ministry of Finance and Ontario Securities Commission Task Force on Securities Regulation. The mandate of the Task Force is to review, and to make recommendations in respect of, the legislative framework for the development of securities policy in the province of Ontario with particular attention to the policy-making role of the Ontario Securities Commission (the "Commission"). The Task Force is required to furnish its report to the Minister by March 1, 1994.

#### Consultative Process

The Task Force will engage in two rounds of public consultation. In the first round, the public is invited to address the issues under consideration by the Task Force. To assist those interested in making a submission, the Task Force has identified certain issues which are of particular interest to it. These questions are identified below. The deadline for written submissions is Friday December 17th, 1993. Formal public hearings will not be held given time pressures and cost considerations. The Task Force will, however, consider requests from groups and individuals wishing to amplify their written comments through a meeting in person.

A second round of public consultation lasting approximately three weeks will take place in January and February of 1994 after circulation of proposed recommendations by the Task Force. As in the first round of consultations, time pressures will require consultation to occur primarily through a written comment process.

#### Background

Over the past decade, reliance on specialized agencies to develop and administer public policy has increased dramatically. At the same time, attention has focused on the policy-making role of such agencies and on the task of reconciling policy-making authority with ministerial accountability in a parliamentary system of government.

The decision of Mr. Justice Blair in Ainsley Financial Corporation et al. v. Ontario Securities Commission et al. (14 O.R. (3d) 280) (General Division) in August addressed this issue in the securities regulation context. Although confined to narrow facts, the decision questioned the Commission's use of a policy statement to address concerns respecting the manner in which penny stocks were sold in Ontario. In his reasons for judgment, Mr. Justice Blair found that, in order to be binding, the policy statement, as drafted, should have been promulgated either as regulation or legislation, both of which require government action to be valid.

The issue of what types of institutional arrangements can best utilize the strengths and expertise of a regulatory agency while maintaining appropriate accountability has been addressed in a number of Canadian studies, including the 1968 MacGuigan Report (Can. H. of C. Special Committee on Statutory Instruments), the 1971 McRuer Report (Royal Commission Inquiry Into Civil Rights, Ontario), the 1985 Law Reform Commission Report on Independent Administrative Agencies (Canada), and, most recently, the 1992 Cornish Report (Achieving Equality: A Report on Human Rights Reform, Ontario). There is considerable variance among these reports in the precise institutional arrangements proposed for policy-making by specialized regulatory agencies.

The Task Force will address the appropriate structure of policy-making in the securities context. The dynamic nature of capital markets requires securities regulators to be able to react to market innovations, both internationally and domestically, in a timely, responsive manner. Further, to facilitate business planning, market participants desire that the legal consequences of conduct be certain and known in advance. Nevertheless, timeliness, responsiveness, and certainty are not exclusive goals; an equally important goal of a legitimate securities regulation system is the encouragement of meaningful public participation in policy formulation. Such participation is promoted, for instance, through opportunities for notice and comment respecting proposed policy initiatives.

To the extent that Canadian regulatory agencies have relied on regulations to make policy, these regulations have usually been enacted through a process of cabinet recommendation and order-in-council. In some regulatory contexts, however, the various goals inherent in a sound system of regulation have been realized by endowing the regulatory agency with delegated regulation or rule-making powers (e.g., the Canadian Radio-television Telecommunications Commission, the United States Securities and Exchange Commission). This power has been subject to various consultative requirements and forms of governmental review, including, *inter alia*, oversight by specialist committees of the legislature, prescribed minimum rights of participation by the public in the agency's policy setting process, appeals to Cabinet from agency decisions, powers of direction by government, sunsets on the legal force of these regulations or rules, and annual reports by the agency to the legislature.

### **Requested Comments**

Members of the Task Force would welcome views of capital market participants with respect to any matter relating to its general mandate, and specifically to the following questions:

- (i) The policy statement has been an important instrument for policy-making by the Commission. The instrument has been used in a range of different contexts, including the Prompt Offering Qualification System (Policy 5.6); Future Orientated Financial Information Policies (Policy 5.8); and Disclosure, Valuation, Review and Approval Requirements for Insider Bids, Issuer Bids, Going Private Transactions and Related Party

Transactions (Policy 9.1). The Task Force will address the substance of policy statements only in so far as such attention informs the issue of the appropriateness of the policy statement as an instrument for realizing the goals of securities regulation policy in different contexts. The Task Force is particularly interested in identifying those circumstances where the policy statement has worked and where it has not. Based on actual experience, is it possible to draw a general distinction between these two categories? Have policy-statements been over-utilized by the Commission, and, if so, what other policy instruments are appropriate for achieving the policy goals of a sound securities regulation regime? Has the Commission's notice and comment procedure allowed the public to participate effectively in the development of policy statements, particularly having regard to the subject matter of the statements? How responsive has the Commission been to the comments received through notice and comment? What other mechanisms could be used to facilitate public participation in the formulation of policy statements? Finally, once policy statements are in place, are there meaningful opportunities for the public to express its views regarding their operation? If not, how could the opportunities for public participation be enhanced?

- (ii) An important feature of the policy statement is that it enables the Commission to coordinate the development and implementation of policy with other provincial securities commissions in a timely fashion, thereby promoting the operation of an integrated national capital market. What impact, if any, does this national market dimension have on the use of policy statements? How, and at what point, should the views of other provincial jurisdictions be incorporated into the consultative process used to formulate policy statements?
- (iii) Some commentators have expressed concern with the failure of regulatory agencies to promote policy statements and guidelines into regulations and legislation as regulatory expertise and confidence with certain policy initiatives grows (see, for example, Hudson Janisch, "The Choice of Decisionmaking Method: Adjudication, Policies and Rulemaking", 1992 Law Society of Upper Canada Special Lectures, Administrative Law: Principles, Practice and Pluralism (Toronto: Carswell, 1993)). Is this assessment accurate in connection with securities regulation? If so, what sorts of institutional mechanisms and criteria would assist the Commission and the Government in determining when it is appropriate to recast a policy statement as regulation or legislation? Alternatively, does the flexibility inherent in a policy statement make it desirable for the Commission to refrain from transferring a policy initiative contained in a policy statement to another instrument? Further, what is the appropriate distribution in the content of a specific policy initiative amongst the

various policy instruments, including: blanket rulings, guidelines, policy statements, regulations, and legislation? In what circumstances is it desirable to enact an existing policy statement entirely as legislation or regulation? Alternatively, in what circumstances is it desirable to enact only portions of an existing policy statement as legislation or regulation with the remainder preserved in the form of a policy statement?

- (iv) To the extent that it is desirable for the Commission to implement more of its policy objectives by regulation or legislation (as opposed to blanket rules, guidelines, or policy statements), does overall demand for Cabinet time support the conferral of a regulation or rule-making power on the Commission? If so, how should such a power work, and what types of checks and balances, if any, should be in place?
- (v) Following from the above questions, what role should the Government play in the development of securities policy in Ontario? How open should communications between the Commission and the Government be to the public? Is it desirable to confer a direction power on the Government which would enable it to instruct the Commission to address a specific problem or issue? If so, how broad or narrow should this power be? Should it be a power of the Minister of Finance or of the Cabinet? Alternatively, should the Government be encouraged to participate in securities policy formulation solely through enactment of legislation or regulation, and what types of consultative processes should precede such activity? If not, what other means exist (and are appropriate) for the Government to communicate its priorities and concerns to the Commission?

### **Submission of Written Comments**

Written comments (six copies) should be delivered to:

Professor Ron Daniels, Chair  
 Ontario Task Force on Securities Regulation  
 Faculty of Law, University of Toronto  
 78 Queen's Park  
 Toronto, Ontario M5S 2C5  
 tel: 978-5842 fax: 978-4198

**APPENDIX III**  
**SUBMISSIONS RECEIVED - FIRST ROUND**



**PROVINCE OF ONTARIO TASK FORCE ON SECURITIES REGULATION****SUBMISSIONS RECEIVED - FIRST ROUND**

<b><u>File No.</u></b>	<b><u>Name/Organization of Submission</u></b>
TFS-1001	Mr. James C. Baillie
TFS-1002	Mr. James Myslicki
TFS-1003	Mr. David Tovell
TFS-1004	Mr. Philip Anisman
TFS-1005	Mr. James P. Renahan Re: C.S.T. Consultants Inc.
TFS-1006	Mr. Selwyn B. Kossuth The Investment Funds Institute of Canada
TFS-1007	Mr. William D. Moull
TFS-1008	The Part-Time Commissioners of the Ontario Securities Commission
TFS-1009	Mr. Frank P. Doyle The Canadian Securities Institute
TFS-1010	Goodman & Goodman
TFS-1011	Mr. William N. Gula Davies, Ward & Beck
TFS-1012	Mr. R.C. Milner and Mr. J.S. Mustoe NOVA Corporation of Alberta
TFS-1013	Ontario Securities Commission Staff
TFS-1014	Mr. R.T. Neville and Mr. D.A. Wilson The Institute of Chartered Accountants of Ontario

<b><u>File No.</u></b>	<b><u>Name/Organization of Submission</u></b>
TFS-1015	Mr. René Sorell McCarthy Tétrault
TFS-1016	Mr. Thomas I.A. Allen (Personal Views) Gordon Capital Corporation
TFS-1017	Investment Dealers Association of Canada
TFS-1018	Mr. J. Pearce Bunting The Toronto Stock Exchange
TFS-1019	Mr. Toomas Marley The Canadian Depository for Securities Limited
TFS-1020	Tory Tory DesLauriers & Binnington
TFS-1021	Mr. Ross M. Skinner (Personal Views) Financial Disclosure Advisory Board
TFS-1022	Ms. Shelley P. Flynn Canada Trust
TFS-1023 *	Mr. John L. Howard (Personal Views) MacMillan Bloedel Limited <i>* Revised version submitted as TFS-1030</i>
TFS-1024	Mr. W.W. Buchanan (Personal Views) The Canadian Institute of Chartered Accountants
TFS-1025	Mr. Rolland Russel Martel
TFS-1026	Mr. D. Shawn McReynolds The Securities Advisory Committee to the Ontario Securities Commission
TFS-1027	Mr. Donald A. Leslie Canadian Investor Protection Fund
TFS-1028	Mr. James H. Cole (Personal Views) Beutel, Goodman & Company Ltd.

<b><u>File No.</u></b>	<b><u>Name/Organization of Submission</u></b>
TFS-1029	Mr. Warren Grover; Mr. Alan Bell; Mr. Justin Connidis; Mr. David Valentine; Mr. Jeffrey Kerbel Blake, Cassels & Graydon (Personal Views)
TFS-1030 *	Mr. John L. Howard (Personal Views) MacMillan Bloedel Limited <i>* Revised version of TFS-1023</i>
TFS-1031	Mr. Douglas P. Thomas Investment Counsel Association of Ontario
TFS-1032	Prof. Jeff MacIntosh (Personal Views) Faculty of Law, University of Toronto
TFS-1033	Stikeman, Elliott
TFS-1034	Mr. Simon A. Romano (Personal Views) Stikeman, Elliott



**APPENDIX IV**  
**SUMMARY OF SUBMISSIONS - FIRST ROUND**



**PROVINCE OF ONTARIO TASK FORCE ON SECURITIES REGULATION****SUMMARY OF SUBMISSIONS - FIRST ROUND****Thomas I. A. Allen (personal views)**

Mr. Allen noted that the issuance of policy statements by the OSC is necessary in that it provides flexibility in a rapidly changing regulatory environment. He also mentioned that policy statements are better suited to the national coordination of securities regulation than is legislative enactment of policy. He therefore concluded that "[i]f the Task Force comes to the conclusion that the policy-making role is a legitimate part of the regulatory process, it seems to me self evident from that that appropriate enabling legislation must be passed so that policies 'bite.'" He added, however, that the OSC must be careful to ensure that there is adequate opportunity for public debate in the development of policies. Specifically, he suggested the following improvements on current OSC procedures for public consultation. Firstly, he suggested the OSC adopt the practice of preparing a summary of submissions received and an analysis of the reasons why the Commission has ultimately come to its policy conclusion. Secondly, he suggested that greater opportunities be provided for the public to express its views regarding the ongoing operation of policies. As an example, he suggested that the Commission engage in an annual review of major policy statements and "report to the public on the principal issues which have been the subject matter of debate over the year between the OSC and applicants seeking relief from the application of policies."

Mr. Allen also expressed support for the government having a limited direction power, whereby it could direct the Commission to address a specific problem or issue. However, he did not feel that this direction power should include the power to direct the Commission as to the resolution of the problem or issue.

**Philip Anisman**

Mr. Anisman began by providing a detailed analysis of the questionable legality of a number of the Commission's regulatory initiatives. He cited numerous examples of regulation by way of policy statements, blanket rulings and orders, notices and "principles of regulation," staff notices, contracts, subdelegation and memoranda of understanding, which he argued were outside the authority of the Commission.

He then concluded that this situation could be rectified by conferring rule-making power on the OSC. However, such rule-making power must be subject to constraints, to assure the accountability of the OSC and to ensure that the rule-making process is fair and open. He did not support a broad grant of rule-making power whereby the Commission would have the authority to adopt "whatever regulations it concludes might be appropriate." Instead, he suggested that the OSC be given rule-making authority in an enumerated list of areas. In order to draw up a list of regulatory areas, he recommended using s.143 as a starting point. A review of current

policies should then be made in light of s.143 to see if there are any desirable policies currently in existence that are not supported by the s.143 list.

Mr. Anisman noted that: "Political and individual values can be addressed by open procedures for the making of regulations and by Government involvement through the power to require<sup>1</sup> and approve or disapprove regulations made by the Commission, combined with various checks against arbitrariness and excess. Open procedures and public notices will themselves provide checks against arbitrary action. Cabinet approval of regulations made by the Commission will both assure political responsibility (as is currently the case with regulations under the Act) and provide an additional form of check through the opportunity for affected persons to seek the intervention of their elected representatives.<sup>2</sup> A final checking function may be provided through judicial review. The Commission's accountability with respect to rule-making can be assured through these measures. Its general accountability can and should be supplemented by other means such as reports to a minister and, of course, ministerial, and ultimately legislative, control of the Commission's budget." He also suggested that a general purpose statement be put in the *Ontario Securities Act* (the "Act"), which might improve the accountability of the OSC.

With respect to the notice and comment procedure, Mr. Anisman made several suggestions:

- (i) He proposed requiring the Commission to publish a concise statement of the basis and purpose of regulations made by it. This statement should address the major issues raised in the notice and comment period.
- (ii) He expressed support for exempting the OSC from the notice and comment procedure where the OSC concludes, for good cause, that compliance is "impracticable or unnecessary", and the OSC publishes such a finding along with a concise statement of the reasons for the finding.
- (iii) He suggested that the Commission should have discretion to hold oral hearings where it concludes they would assist it in regulation-making.
- (iv) He argued that all submissions under the notice and comment procedure must be available to the public.

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<sup>1</sup> Specifically, Mr. Anisman expressed support for a publicly exercised direction power. He noted: "The legislation should, therefore, obligate the Commission to initiate a proceeding to make regulations to implement a policy direction sent to it by the Lieutenant Governor in Council ... The Government may determine a policy and direct the Commission to pursue it, and the Commission through a rule-making proceeding will be enabled to decide on the most effective manner of implementing the Government's policy."

<sup>2</sup> Specifically, Mr. Anisman suggested that "[i]n view of the other demands on Government time, it would be preferable to provide that regulations adopted by the Commission come into effect a specified number of days after they have been adopted, unless the cabinet disapproves of them."

- (v) He supported encouraging the Commission to provide early warning of issues that it is considering addressing through adoption of rules or policies. As a result of such early warning, it would be possible to have general consultation on policy concepts before draft regulations are put out for notice and comment.

In addition to allowing the OSC to issue rules or regulations, Mr. Anisman noted that the Securities Act should be amended to allow the OSC to "enter into contracts with other securities and financial regulatory authorities in connection with its administration of the Act, and to delegate various of its powers to self-regulatory organizations. The legislation should also be amended expressly to authorize the Commission to promulgate policy statements, but this power should be confined within the framework of its overall regulation making powers." He further suggested that the Act be amended to define policies so as to distinguish them from rules and regulations.

#### **James C. Baillie**

Mr. Baillie feels that "there should be legislative recognition of the Commission's policy-making authority in order to resolve the doubts raised by *Ainsley*." However, he also noted that there exist numerous defects in the current policy-making process of the OSC. For example, there is too little emphasis placed on the process through which topics for policies and rules are decided. Consequently, he suggested that the Commission publish, at regular intervals, "an information statement indicating the specific topics upon which policy-making efforts are in progress and the relative urgency attached to those projects." Comments should be sought in relation to this document.

He also suggested that the Commission adopt procedures to make it easier for it to deal expeditiously with requests for interpretations, dispensations and exemptions from policy statements. In this way, policy statements would not be rigidly applied as they often tend to be.

In addition, he made several suggestions for improving the notice and comment procedure. Firstly, he suggested that in certain instances notice and comment should begin at an earlier date, with preliminary consultation on basic issues. Such consultation would precede the preparation of a draft policy and the negotiation of this draft policy amongst the various Canadian regulators.

Secondly, he suggested that the OSC should hold meetings with affected constituents, in which there would be detailed discussion of their comments.

Thirdly, he suggested that the OSC accompany each new policy initiative with an impact statement. This impact statement should clearly demonstrate that issues such as the cost of compliance and the structural impact of the policy have been considered.

With respect to Cabinet involvement in the policy-making process, Mr. Baillie suggested that "Cabinet be given a general authority to intervene as to a specific policy where

it thinks appropriate. A special procedure should apply to policy statements that go beyond the legislative and regulatory pattern or are inconsistent with that pattern." He also noted that the Task Force should "strain against recommendations whose implementation would involve development of a policy-making cadre on securities matters within government but outside the Commission." He further noted that "it should be open to Government to dictate policy on issues that it considers important, provided this is done openly and publicly" Day-to-day policy-making, however, should remain with the Commission.

Finally, he argued that the policy-making process should be designed so as to include incentives for the Commission to convert policy statements into cabinet adopted regulations.

**Jalynn H. Bennett, John W. Blain, James R. Brown, Morley P. Carscallen, Dean C. Kitts, David T.C. Moore, Glorianne Stromberg, OSC Part-Time Commissioners (personal views) (the "Commissioners")**

The OSC Commissioners, writing in their personal capacities, argued that the *Ontario Securities Act* should be amended to expressly state the mandate<sup>3</sup> of the Commission and to give the Commission sufficient authority to validly issue mandatory rules within the scope of its mandate. The Commissioners also noted that it is important that the Commission retain "the flexibility to act in a timely manner, relatively free of procedural restraints beyond the ones which the Commission has developed in its practice to date."

Their proposal would effectively allow the OSC to continue regulating the market as it has in the past. They noted that this is desirable because the present regulatory structure has worked well. The Commission has been successful in dealing in a practical and timely way with the needs of the investing public and the capital markets generally.

With respect to Government involvement, they recommended that the Government not maintain a separate ministerial staff working on securities matters. "The Commission, through the Chair, should be the Minister's prime resource if advice is needed." They also did not support a cabinet veto of rules enacted by the OSC. They argued that this would undermine the non-partisan, independent nature of the OSC.

**W.W. Buchanan, Canadian Institute of Chartered Accountants (views have not been officially reviewed or endorsed by CICA)**

Mr. Buchanan noted the importance of ensuring that the regulatory system is sufficiently flexible to enable prompt action in response to rapid changes in the market place. He also noted that attention should be focussed on improving cooperation amongst provincial

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<sup>3</sup> They consider the mandate of the OSC "to be to act in the public interest: (a) to protect investors from unfair, improper or fraudulent practices; and (b) to foster and maintain fair, equitable and efficient capital markets in Ontario."

regulators, with a view to creating consistent national standards whenever possible. For example, he suggested that prior to the issuance of material by the OSC for public comment, consultation should take place with other jurisdictions.

With respect to policy development by the OSC, he noted that public consultation is essential, regardless of the policy instrument chosen. He suggested that an attempt be made to define the purpose and status of each different policy instrument. If any such instrument is to be used without consultation, the community should be notified of this fact and of the circumstances under which this instrument will be used.

### **J. Pearce Bunting, The Toronto Stock Exchange (the "TSE")**

The TSE expressed its support for granting rule-making authority to the OSC. They noted that this would enable the OSC to respond quickly to market developments, and would be helpful with respect to the national coordination of securities policies. As well, they noted that prior to *Ainsley* the OSC's use of policy statements to regulate the market had been effective. Another argument raised by the TSE in support of rule-making is that securities regulation requires a high degree of specialized expertise.

The TSE suggested that the rule-making authority be accompanied by both a more formal reporting requirement between the Commission and the government, and by mandatory notice and comment procedures that would be followed before rules could be enacted. While the notice and comment procedures currently used by the OSC before implementing policies have generally worked well, the TSE offered several suggestions for improvement. First, it suggested that the OSC should "undertake to review significant points raised by commentators with them before finalizing their policy recommendations". Second, it suggested that "public comments should be solicited on proposed national policies before the CSA negotiates and commits to a particular approach to an issue." Third, it suggested that if significant changes are made to a policy after the initial notice and comment period, a second notice and comment period should follow. Fourth, it suggested that if, after notice and comment, the OSC decides not to introduce a new policy, this should be publicly announced. Fifth, it suggested that when a rule is proposed the OSC should be required to address the comments received during the notice and comment period. Finally, the TSE suggested that something should be done to address the lack of public input into the policy-making priorities of the OSC. "One possible approach to this issue would be to provide for any interested person to petition the Commission to make, amend or repeal a rule."

With respect to the mechanics of the legislative delegation of rule-making authority, the TSE suggested that broad policy guidelines be set out in the Act and that general areas with respect to which the OSC could enact rules be enumerated. In addition, individual sections of the Act could contain explicit grants of rule-making authority. It noted that this "dual approach to delegation of authority was employed by the United States Congress in delegating rule-making authority to the Securities and Exchange Commission".

Finally, the TSE noted that the Cabinet should have the authority to supersede any rule passed by the Commission. Judicial review should also be used to help ensure that the OSC does not exceed its jurisdiction.

**James H. Cole, Beutel, Goodman & Company Ltd. (personal views)**

Mr. Cole supports the conferral of rule-making authority upon the OSC. Under his proposal, before enacting a rule the OSC would be required to allow for public consultation through notice and comment, and perhaps through public hearings for matters of great importance. A further check on the OSC's rule-making authority would be provided by requiring the OSC to prepare an annual report to the government, and by granting the government a limited power of direction on matters of general policy. The government would not, however, be able to direct or overturn specific decisions. Also, all communication between the Commission and the government should be completely open to the public. Judicial review would be available to parties affected by OSC rules if these rules were believed to exceed the Commission's authority.

Mr. Cole specifically commented on the importance of preserving the independence of the OSC while also ensuring that appropriate accountability of the Commission is maintained.

Finally, Mr. Cole made several suggestions with respect to the position of the OSC Chairperson. First, he suggested that the OSC Chair should serve a longer term. "It is simply not possible to shepherd important matters through the regulatory process, either the current one or even that proposed, in the one or two years the recent chairman [*sic*] have served. Furthermore, the rapid turnover of the chairman fosters regulatory uncertainty..." He also suggested that compensation of the chairman be adjusted upwards so as to attract appropriately talented individuals.

**Davies, Ward & Beck**

Davies, Ward & Beck expressed support for conferring on the OSC a rule-making power similar to that of the SEC. It noted that this would enable the Commission to respond quickly and effectively to emerging problems in securities markets. As well, it noted that "[t]he proper functioning of capital markets is enhanced by the presence of clear, legally-binding rules that provide notice to the investment community of the standards and requirements they will have to meet. The Commission, as an expert body whose mandate is to protect the integrity of capital markets, is well placed to define and to enforce such standards." It also noted that despite the existence of rule-making authority there would still be a role for non-binding policy statements.

Davies, Ward & Beck argued that the OSC's rule-making power should be subject to notice and comment procedures similar to those of the U.S. *Administrative Procedure Act*. In addition to the normal requirements of advance notice and an opportunity for comment, it suggested that all draft rules be accompanied by an "Explanatory Statement" which would include a description of the objective of the rule, the statutory power relied on, the alternatives that were considered and why those alternatives were rejected, and a description of the impact of the rule.

Furthermore, it suggested that when a regulation was enacted in its final form it should be accompanied by a description and analysis of the submissions received. Davies, Ward & Beck noted that in circumstances of pressing or immediate nature, the Commission should be permitted to immediately enact a rule, on an interim basis, by-passing the notice and comment procedure. However, before such a rule could become permanent, it would have to be subjected to notice and comment.

With respect to Cabinet oversight of OSC rule-making, Davies, Ward & Beck suggested allowing the Cabinet to veto or disapprove of OSC rules. It would also grant the Cabinet a direction power similar to that found in the *Broadcasting Act*.

Finally, Davies, Ward & Beck suggested that the OSC's rule-making power should be tied to an express statutory statement of the Commission's mandate. It did not offer a precise definition of the OSC's mandate, but noted that it is widely recognized that the OSC has a responsibility for investor protection and for maintaining the integrity of the capital markets. According to Davies, Ward & Beck, the Commission should have the power to enact rules that are "necessary, in the opinion of the Commission" in order to implement or to fulfil the Commission's mandate.

#### **Frank P. Doyle, The Canadian Securities Institute (the "CSI")**

The CSI recommended that "the OSC be statutorily empowered to engage in policy-making through binding regulations." The CSI linked their recommendation to their specific role of educating individual market participants and ensuring their proficiency. They noted that the OSC plays an important role in the determination of proficiency requirements and could best fill this role if it had "jurisdiction to regulate and supervise all aspects of the Ontario capital markets."

#### **Shelley P. Flynn, Canada Trust**

Canada Trust noted the opinion that "policies are a thinly veiled attempt to enact legislation by means offensive to a democratic society. The state legislates either by statute or regulation under the statute and not by pronouncements enacted by well-meaning groups of bureaucrats. Policies should only be used to explain existing statutes and regulations not to create new law."

Canada Trust felt that the OSC's role should be to propose legislation to the Cabinet. It should not have the power to legislate via policies. Further, Canada Trust suggested that any current policies which do more than simply explain the law and regulations should be recast as regulations or legislation.

Canada Trust also commented upon the importance of coordinated national regulation. It argued, however, that policy statements do not promote the operation of an integrated national capital market. It believed that policies lead to a fragmentation of the

Canadian market. Canada Trust proposed that a National Securities Act or a Uniform Securities Act be created.

Finally, Canada Trust included specific comments outlining its concerns relating to inefficiencies in the regulation of mutual funds, and suggested improvements to this regulatory regime.

### **Goodman & Goodman**

Goodman & Goodman noted that despite the questions raised by *Ainsley*, the existing system of policy-making by the OSC functions reasonably well. As a result, it supported delegation of rule-making power to the OSC. Rules made by the Commission would be subject to procedural requirements of notice and comment. Goodman & Goodman noted the desirability of public hearings being incorporated into the notice and comment process, but acknowledged that public hearings should not be mandatory, in recognition of constraints on time and other scarce resources.

Goodman & Goodman also proposed certain checks on the OSC's rule-making power. First, it suggested that rules either have a sunset period, after which they would cease to have effect unless they had been elevated to the form of regulations or legislation, or that the Cabinet have a specific period before rules take effect during which it could veto them. It noted that whatever solution is adopted must preserve the OSC's flexibility, which it considered to be fundamental to market efficiency and integrity.

Finally, Goodman & Goodman expressed support for increased uniformity of securities regulatory requirements nation-wide and for inter-jurisdictional cooperation whenever possible.

### **Warren Grover, Alan Bell, Justin Connidis, David Valentine, Jeffrey Kerbel, Blake, Cassels & Graydon (personal views) (the "Blakes group")**

The Blakes group began by noting that "[t]he current system of issuing policy statements without any statutory basis for doing so cannot be maintained." The Blakes group did not present a firm conclusion as to the desirability of rule-making power being conferred on the OSC. However, it did note that granting the OSC rule-making or policy-making power had certain advantages over requiring that Cabinet regulations be enacted to deal with matters currently dealt with by policy statements.

The Blakes group also discussed the current notice and comment procedure and made the following suggestions:

- (i) "No policy which has not first been released for comment should have immediate effect and no policy should be given a retroactive effect".

- (ii) The Task Force should consider the feasibility of incorporating public hearings into the notice and comment procedure.
- (iii) The CSA and the provincial securities regulators should, at least once a year, publish and solicit comments on a concept release setting out general matters under consideration by the securities regulators and a brief summary of the policy concerns in respect of each matter.

Finally, the Blakes group made the following suggestions:

- (i) The Task Force should examine the appropriateness of the investigation, enforcement and adjudication functions of the OSC being vested in one body.
- (ii) "The Task Force should examine the appropriateness of the Ontario Securities Commission making rules with respect to corporate procedural and governance matters..."
- (iii) The Act should be amended in order to clearly permit the OSC to issue blanket rulings. The Blakes group argued that these blanket rulings should be used to exempt market participants from the registration and prospectus requirements. They noted that blanket rulings "should not be used to create a separate regulatory regime."
- (iv) If the public interest power is retained, the parameters under which it will be exercised should be defined in the statute. As well, the public interest should be defined so as to adopt the concept of market efficiency.

#### **John L. Howard, MacMillan Bloedel Limited (personal views)**

Mr. Howard noted that "the policy initiatives of the securities administrators during the last 15 years ... have demonstrated good if not exemplary governance." He went on to comment that we cannot have judicial review or rule-making in a parliamentary system. As a result, he suggested that "we need mechanisms that compel public administrators to use blanket rulings, guidelines and policies ... to fill that institutional gap."

#### **Investment Dealers Association of Canada (the "IDA")**

The IDA stressed the importance of efficiency, timeliness and certainty with respect to securities regulation. It suggested that the Legislature outline the general objectives<sup>4</sup> of securities regulation policy in the Act and that the OSC be given "a general jurisdiction to

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<sup>4</sup> According to the IDA, these objectives should be "(i) to promote efficiency in the capital markets and to create and maintain confidence in such markets; and (ii) to protect the investing public against unfair, improper and fraudulent practices."

regulate and to supervise the Ontario capital markets with a view to implementing ... [these] objectives". The IDA suggested that the OSC should have the power to engage in policy-making through binding regulations. The procedure by which the OSC makes these regulations should be prescribed in the Act, and should include the existing notice and comment procedure. It added that consultation should begin at an early stage, before the issuance of a settled draft regulation. As well, it noted that "methods it should be adopted to allow for public participation in the process through which the specific subject matter of new policy initiatives is determined." To this end, it suggested that information bulletins covering forthcoming policy initiatives should be published. According to the IDA, the OSC should regularly brief Cabinet on policy initiatives, but should not be subject to Cabinet review or appeal. It did not endorse a direction power. However, it submitted that if such a power were granted, it should be limited to general direction and be fully transparent. Finally, the IDA suggested that there should be provision for periodic review of the Act, and of policy statements.

#### **Selwyn B. Kossuth, Investment Funds Institute of Canada**

The Investment Funds Institute of Canada commented on the importance of flexible, expert policy-making. It also expressed support for national consistency. It noted that without general policy-making power on the part of all provincial securities regulators, it would be difficult to satisfy the goals of flexibility and national coordination. Finally, it noted the importance of consultation between the regulators and the industry, specifically commenting on the importance of beginning the consultative process at an early stage.

#### **Donald A. Leslie, Canadian Investor Protection Fund ("CIPF")**

CIPF noted that the OSC must be independent and must have the power to act promptly in a rapidly changing world. The importance of speed was specifically tied to the fact that CIPF, when it wishes to amend its policies or standards, must seek the approval of all the provincial securities commissions. Therefore, CIPF felt that the "Ontario government should move quickly to remove any doubt as to the ability of the OSC to develop and enforce policies as a result of the *Ainsley* decision." To this end, it expressed support for the recommendations submitted by the IDA and the TSE.

#### **Professor Jeffrey MacIntosh, Faculty of Law, University of Toronto (personal views)**

Professor MacIntosh expressed strong Rule of Law concerns. He argued that many OSC policy statements attempt to add substantive requirements to those contained in the Act or regulations, and are thus suspect under the logic of *Ainsley* and *Pezim*. In order to rectify this, Professor MacIntosh supported the conferral of rule-making authority upon the OSC. He noted that this would enable the OSC to act expeditiously, to coordinate its rule-making activities with other jurisdictions, to apply its expertise and to structure its discretion, thus furthering market certainty.

However, Professor MacIntosh also supported certain restrictions on the rule-making power. First, he suggested that it be subject to notice and comment procedures. Only with permission of the Minister could a rule take effect prior to the completion of notice and comment, and this procedure could be adopted only in response to a regulatory emergency. Second, he suggested that where the proposed regulatory changes are substantial, public hearings should be held as part of the consultative process. Initially, the decision as to whether or not to hold public hearings would be left with the OSC. However, the Minister, if unsatisfied with the OSC's decision, would be empowered to order the OSC to hold public hearings. Third, he suggested that there be a legislative override. The Legislature should be able to amend or veto any rule proposed by the OSC. Fourth, Professor MacIntosh suggested that the Act contain a Mission Statement, which the Commission would be required to reinterpret annually, in a broad and public document. Fifth, he suggested that the scope of the rule-making power should make it clear that "the regulators may make rules only in relation to those matters explicitly dealt with under the *Securities Act*; namely, primary and secondary market disclosure, registration, takeover bids, and insider trading." The OSC should not be intruding upon the domain of corporate law.

Finally, Professor MacIntosh noted that he agrees with Professor Janisch's suggestion that the OSC's public interest powers should only be remedial in nature, rather than substantive. According to this view, the OSC's public interest powers could only be used in the event that there is a breach of the Act or the regulations. Failing this, Professor MacIntosh suggested that the statute specify that the public interest powers "may only be used in relation to those subject matters specifically covered under the *Securities Act*."

#### **Toomas Marley, The Canadian Depository for Securities Limited (the "CDS")**

The CDS expressed general satisfaction with its relationship with the OSC and with the policy statement process (particularly in relation to National Policy 41). It also noted the importance it placed, as a national organization, on the national coordination of securities regulation. It noted that the semi-annual conferences of the CSA have proven effective to this end but suggested that a more public dimension be added to these conferences. Finally, it stated that it "[did] not object to a broader legislated mandate and powers for the Commission following the models in the Quebec Securities Act or the American Securities Exchange Act." It added that the challenge is to ensure that the Commission remains "an independent body with experienced staff and sufficient resources to deal with business problems in the interests of the capital markets and investing public of Ontario."

#### **Rolland Russell Martel**

Mr. Martel argued that the OSC sometimes uses policy statements to attempt "to expand its jurisdiction beyond what the legislature has included in the Act or the cabinet has provided in the regulations." He was opposed to this use of policy statements and noted that such policies have had adverse effects on small industrial issuers and on economic development in Ontario. According to Mr. Martel, the only policies that have worked well are those that explain or constructively expand upon particular sections of the Act or Regulations.

With respect to rule-making, the general tenor of Mr. Martel's comments appeared to indicate opposition to the conferral of such a power upon the OSC. He noted that "[p]olicy making [should] remain a function of the provincial government rather than the OSC because so much of securities policy affects economic development, a prerogative of the provincial government." He also noted that giving the OSC rule-making power might result in a conflict of interest: "Granting the OSC rule-making power is analogous to giving the courts the right to legislate." However, he did say that "If a more formalized system of policy development than that which the OSC is presently using is needed, we would support the David Lepofsky proposal for rule-making summarized by Mr. Janisch on page 292 of 'The Choice of Decision Making...' In addition, any new rules should contain a sunset clause to ensure that the rules are periodically re-examined or allowed to lapse. "

Mr. Martel also commented on the leadership role of the OSC. However, he viewed it in a negative light. He argued that national coordination of securities policy "is not as well developed as one would like." He blamed this on the fact that "Ontario appears to lead the other provinces rather than co-operating with them." He suggested that Ontario acts as if it has a "manifest destiny mandate".

#### **D. Shawn McReynolds, Securities Advisory Committee to the OSC ("SAC")**

SAC expressed its support for granting the OSC rule-making power. It added that this rule-making power must be subject to procedural requirements guaranteeing "investors and participants in the capital markets a meaningful opportunity to express their views to the Commission in advance of the enactment of binding rules". It also would require that an adequate opportunity be afforded to the Government to assess the rules prior to their enactment, and to fulfil its duty to oversee the Commission.

#### **R.C. Milner and J.S. Mustoe, Nova Corporation of Alberta ("Nova Corp.")**

Nova Corp. expressed general satisfaction with the way in which the current regulatory regime has functioned. It noted that it is important that any regulatory regime be capable of responding quickly to changes in the market. As well, it stressed the importance of securities regulation remaining non-political. Finally, it commented on the desirability of increased uniformity of regulatory requirements nation-wide.

With respect to rule-making power, Nova Corp. noted: "We would prefer to see the Commission vested with rule-making (and rule changing) power than to see policies set in place by Cabinet action. An appropriate check and balance for any rules which are restrictive in nature, rather than permissive, would be for the Commission to put them in place with a sunset clause requiring another round of public comment after some specified period of time or, although we are less in favour of this second alternative, requiring they either be abandoned or be adopted by the legislature as legislation or regulation within such period. We feel the permissive policies (like the POP system) do not require the same checks and balances as restrictive policies (like Ontario Policies 5.8 and 9.1)"

With respect to the notice and comment procedure currently being followed, Nova Corp. made the following suggestions:

- (i) All policies should be subject to notice and comment before they become effective. There should be no exceptions to this requirement.
- (ii) Nova Corp. suggested that in the case of policy statements that are clearly controversial or are not working out as planned, a follow up comment period should be instituted a year or two after the initial enactment of the policy.
- (iii) Nova Corp. suggested that a discussion paper on comments received by the Commission should be published at the time the final policy is put in force.

#### **William D. Moull**

Mr. Moull began by stressing that the current regulatory structure works fairly well. The Ontario Securities Commission plays a pivotal role in this structure, evaluating and enunciating the public interest, bearing the day-to-day regulatory burden and issuing policy statements. However, Mr. Moull noted that the system could be improved if the statute were amended to (i) include the OSC's mandate with respect to the public interest, and (ii) grant the OSC clear statutory authority to adopt and enforce policy instruments. Mr. Moull did not express an opinion on whether these policy instruments should be the current policy statements, more formal rules, or a mix of the two.

#### **James Myslicki**

Mr. Myslicki made numerous recommendations for more effective regulation of the over-the counter stock market and the brokers active therein.

#### **R.T. Neville and D.A. Wilson, The Institute of Chartered Accountants of Ontario**

The Institute of Chartered Accountants of Ontario noted that the present framework for policy-making has been both timely and effective. It therefore recommended that "powers be conferred on the Commission which would enable it to make regulations or rules governing the daily operations and activities of the capital markets." However, along with such a rule-making power, the Institute also suggested requiring a "broader consultative framework than that which currently exists."

#### **O.S.C. Staff**

The OSC Staff proposed that the OSC be given rule-making authority. Granting the OSC such power would effectively be a formalization of the current regulatory framework which "generally has been acknowledged to be an effective mechanism for securities regulation and policy formation."

The OSC Staff noted that it is not opposed to the OSC's rule-making power being co-extensive with the regulation making power conferred upon government by the Act. It noted that the scope of the authority should permit both the government and the OSC to make such binding rules/regulations as they "may consider to be necessary or desirable for the due carrying out of the provisions of the Act."

The OSC Staff noted that given the co-extensive nature of the rule-making power which they have proposed, the government would effectively be able to override any OSC rule by passing a Regulation.

The OSC Staff also suggested that the Commission's mandate be included in the Act. The OSC Staff views the OSC's mandate as including investor protection and the promotion of a fair and efficient capital market.

With respect to accountability, the OSC Staff supported a rule-making process that is transparent and that provides for a meaningful opportunity for public comment. As well, it believed that OSC rules should not come into effect for a specified period of time following their adoption by the Commission (the "pre-effective period"). However, the OSC Staff supported an exception whereby, in exceptional circumstances, both the notice and comment period and the pre-effective period could be waived or abridged provided the OSC published its reasons for so doing. The OSC Staff also discussed the appropriateness of a Cabinet override. While they did not feel such a power was necessary, they did not object to granting the Lieutenant-Governor in Council authority to disallow an OSC rule. On the other hand, the OSC Staff was opposed to giving the Cabinet a policy direction power. They felt that such a power would undermine the Commission's independence. However, they noted that if such a power were granted, it should be exercised transparently and should only apply to "non-prescriptive directions of general application on broad policy matters."

Two final recommendations made by the OSC Staff were: (i) that the OSC be required to publish annual policy agendas, and (ii) that the Act be amended so as to clarify the OSC's authority to issue blanket rulings.

**James P. Renahan, C.S.T. Consultants Inc.**

CST suggested that the Task Force "initiate the unification of all Securities Commissions by recommending the introduction of policies nationwide." They expressed particular concern about the non-uniformity of policy statements related to distribution and administration of Registered Education Savings Plans.

**Simon A. Romano, Stikeman, Elliott (personal views)**

Mr. Romano expressed support for rule-making powers being granted to the Commission. However, he noted that some scope should still remain for less formal policy articulation.

including: With respect to checks on the rule-making power, he made several suggestions,

- (i) The rule-making authority should be carefully outlined, with purposive language and limits. It should not be vague and all encompassing.
- (ii) There should be parliamentary monitoring and public annual reports.
- (iii) "Rules should only be promulgated after review by an independent office unconnected with the OSC to ensure that they are authorized by statute, do not constitute an unexpected use of power, do not trespass unduly on existing rights and freedoms, do not contravene the Charter, and ... are well drafted."
- (iv) The Legislature should be able to repeal rules with which it does not agree.
- (v) There should be a cabinet direction power on broad issues.
- (vi) Public consultation should be required prior to the implementation of rules. Furthermore, input resulting from this consultation should be considered and addressed by the Commission.
- (vii) "Where appropriate (such as where livelihoods are at stake, for example), oral hearings and the right to cross examine should be essential."

Finally, Simon Romano suggested that the OSC's punitive powers with respect to breaches of OSC-made rules should be carefully tailored so as to ensure that the OSC is not the sole interpreter of its rules for punitive purposes.

#### **Ross M. Skinner, Member, Financial Disclosure Advisory Board (personal views)**

Ross Skinner appeared to support the conferral of rule-making power upon the OSC, balanced by protection against arbitrary exercise of such power. However, he noted that "a delegation of power in general terms may go beyond what is needed and has the potential to create conflicts with established institutions that are functioning reasonably satisfactorily." Specifically, he expressed concern about the Commission being granted power to prescribe reporting standards applicable to financial filings under the Act.

#### **Rene Sorell, McCarthy Tétrault**

McCarthy Tétrault expressed support for amending the Act to confer a policy-making power on the OSC. This power would be subject to several checks:

- (i) "No policy can be adopted or go into force without an appropriate comment period... When a policy is finalized, a summary of comments received should be

presented by the Commission and, where reasonably practicable an explanation provided to the public as to why significant comments were not followed and alternatively as to why comments were adopted".

- (ii) The policies passed by the OSC would be subject to a sunset clause whereby, after 2 years, every policy must either be enshrined as legislation or re-subjected to notice and comment. Furthermore, if a policy had no statutory foundation, it would become invalid after 2 years unless during that period legislative amendments providing a statutory basis were passed. McCarthy Tétrault argued that this would ensure that policy statements were frequently reviewed by the OSC and that sufficient government oversight existed.

McCarthy Tétrault also noted that it might be helpful "if a committee of the Legislature set aside a fixed period of time at least once a year to receive a report from the Commission and to discuss in public the policy issues that various parties from time to time wish to raise for consideration."

#### **Stikeman, Elliott**

Stikeman, Elliott began by expressing a belief that the current process of "regulation by policy statement", has been successful despite its "somewhat dubious pedigree". Consequently, it expressed hope that *Ainsley* and the Task Force will result in the government taking some action to reform Ontario's securities law so that "no questions will remain as to the jurisdictional authority of the Commission to put in place policies or rules." It left the development of the exact model for legitimating the OSC's policy-making role to others.

It did note, however, that the conferral of some form of rule-making authority upon the Commission should not preclude the Commission from continuing to issue policy statements which do not have the force of law, and which express general principles that inform the Commission's use of its discretionary and disciplinary powers.

Stikeman, Elliott also commented on the perceived lack of attention paid by the OSC to the "status, organization and overall coherence of outstanding policy statements". It expressed the hope that with the formalization of the OSC's rule-making function there would be a more disciplined approach to the maintenance of the rules. It also suggested that there be regularly scheduled review of policy statements: "...there should be a regularly scheduled review which would either elevate policies, if they are still appropriate, to regulations or to legislation, vary the policy to address refinements, or be subject to a 'sunset' rule."

Finally, Stikeman, Elliott commented on the need for policies to be articulated specifically rather than generally. It noted that "[p]eople plan their commercial and other affairs around the rules that they believe will govern them, and become quickly infuriated when the inference can be drawn that rules are being made up as they go along. ... Just as a number of taxpayers have 'gotten away' by using a 'loophole', the system is better for the apparent fairness

that it exhibits. In other words, general and potentially self-righteous expressions of the 'public interest' should be kept to a minimum and subject to clear rules that eliminate the criticism of potential retroactivity."

**Douglas P. Thomas, Investment Counsel Association of Ontario ("ICAO")**

ICAO stressed the importance of the Commission being able to move swiftly and effectively. It noted that the government is less able to meet these objectives than is the OSC. Consequently, it concluded that the Commission should have a regulation or rule-making power, with appropriate checks and balances.

As to the role of Government in the development of securities policy, it noted: "...we suggest the Commission should report through the Minister of Finance, but that it should be allowed maximum freedom in carrying out its mandate. The ability of government to respond effectively and quickly to rising situations is not good. It would seem appropriate for a parliamentary committee to have annual review, which would be addressed by the Commission, and where the Commission could be cross examined by Members of Parliament. Perhaps some longer term requirement of review should be in place - say, once every five years or so, when the mandate would be examined, and the structure and practices come in for close analysis."

**Tory Tory DesLauriers & Binnington ("Torys")**

Torys stated that there was only limited support within the firm for rule-making power being conferred upon the OSC. However, it did make several suggestions with respect to the way in which policy statements are currently developed. First, it suggested "that a mechanism be developed whereby suggestions for policy statement topics could formally be put before the full Commission for consideration". Second, it expressed support for consultation with the public before policies are enacted. It noted that the current notice and comment procedure could be strengthened by (i) the addition of face to face meetings with affected groups and (ii) the creation of a consultative phase prior to the publication of a proposed policy where the OSC canvasses broadly for possible resolutions to the policy issue. Third, it suggested that the OSC should be open to consultation on policy statements after implementation.

Torys noted that "it is essential that policy statements (other than perhaps those of a housekeeping nature) be co-ordinated with those of other provincial jurisdictions." It also noted that the principal advantage of policy statements is flexibility.

With respect to Cabinet involvement, Torys expressed the view that the Commission should be responsible for "ordinary course policy-making ... and that this should not involve Cabinet." It noted that this would "encompass matters of a housekeeping nature together with matters more substantive in nature regarding which there is clear discretion in securities legislation for the Commission to act." However, Torys went on to note that there was a general consensus within the firm that "some Cabinet involvement is required regarding policy that goes beyond the scope of existing legislation or acts in a manner inconsistent with the legislation."

While it was noted that there was variance within the firm as to the nature of this Cabinet involvement, Torys added that as a minimum it "believe[d] that Cabinet should be clearly apprised of the policy initiative and given an opportunity to consider, discuss and approve the policy initiative."

Finally, with respect to the use of instruments other than policy statements, Torys stated that its comments should "apply to the extent possible to these other instruments." With respect to these other instruments, Torys also noted that "on occasion, there have been communications (for example, through speeches or comment letters) where it has not been clear whether the communication states a formal policy of the Commission." It suggested that "the credibility of the Commission is undermined where this uncertainty exists."

#### **David Tovell**

David Tovell suggested that all OSC policies be clearly subordinate to securities legislation. He added: "Philosophically it is the legislature that represents public interest and an all party committee, similar to the Public Accounts Committee, could provide this overview. This would also present an opportunity to invite Ministers and others to appear before the committee. The chair of the OSC would appear at all meetings and the securities legislation could be administered by the Minister of Finance (similar to the Audit Act)."

**APPENDIX V**

**INTERIM REPORT**

**REQUEST FOR COMMENTS - SECOND ROUND**



## THE PROVINCE OF ONTARIO TASK FORCE ON SECURITIES REGULATION

### INTERIM REPORT

#### REQUEST FOR COMMENTS - SECOND ROUND

The joint Ministry of Finance and Ontario Securities Commission Task Force on Securities Regulation (the "Task Force") is publishing for comment its interim report on recommendations respecting the legislative framework for the development of securities policy in the province of Ontario.

The Task Force was appointed by Ontario Finance Minister Floyd Laughren on October 7, 1993 to consider the appropriate legislative response to issues raised by recent court decisions regarding the policy-making authority of the Commission. The Task Force was appointed to make recommendations with a view to ensuring continued investor protection and the maintenance of the integrity of the capital markets in Ontario.

The Task Force is publishing its interim report following public consultation and review of submissions made to the Task Force in response to a request for comments published on November 5, 1993.

The Task Force received and reviewed 33 written submissions. The Task Force reviewed these submissions in detail and took account of recommendations made by commentators in the formulation of its recommendations. To the extent recommendations made by commentators were not adopted by the Task Force in the interim report, an attempt was made by the Task Force to explain the reasons for the Task Force's alternative proposals. The Task Force wishes to express its gratitude to those who have participated in the process.

Members of the Task Force welcome the public's views with respect to any matter addressed in the interim report of the Task Force.

In formulating recommendations for consideration and public comment, attention of the Task Force has focused on the policy and rule-making role of the Commission. In considering various models, the Task Force sought to identify a means of best utilizing the acknowledged expertise and strengths of the Commission while maintaining appropriate public accountability. The Task Force invites comment on the manner in which it recommends that this balance be achieved.

At the same time, the Task Force sought to be responsive to the variant needs for commercial certainty and flexibility within the securities regulatory regime. Amongst the more significant recommendations made by the Task Force are proposals for a statutory "purposes and principles" provision in the Securities Act to provide a framework for the exercise of regulatory

authority by the Commission. Comment is specifically requested on the Task Force's recommendations in this regard.

As in the first round of consultations, time pressures will require the public consultation and comment to occur primarily through a written comment process. While the Task Force was initially asked to report to the Minister by March 1, 1994, in the interest of full and fair public participation in the process, the Task Force has requested an extension of this date to April 8, 1994. This will afford the Task Force a lengthier period for this second round of public consultation.

Comment is requested in writing by March 24, 1994, four weeks from the date of publication of this request for comment. Written comments (six copies) should be delivered to:

Professor Ron Daniels, Chair  
Ontario Task Force on Securities Regulation  
Faculty of Law  
University of Toronto  
78 Queen's Park  
Toronto, Ontario  
M5S 2C5

Tel: 978-5842

Fax: 978-4198

Commenters are encouraged to file their submissions with the Task Force at the earliest opportunity to afford the Task Force the greatest opportunity for review.

### **Ontario Task Force on Securities Regulation**

Ronald Daniels, Chair	Associate Professor Faculty of Law, University of Toronto
Elizabeth Atcheson	Director Policy Branch, Financial Institutions Ministry of Finance
Shane Kelford	Partner Blake, Cassels & Graydon
Leslie Milrod	Director Office of the General Counsel, Ontario Securities Commission

**APPENDIX VI**

**SUBMISSIONS RECEIVED - SECOND ROUND**



**PROVINCE OF ONTARIO TASK FORCE ON SECURITIES REGULATION****SUBMISSIONS RECEIVED - SECOND ROUND**

<b><u>File No.</u></b>	<b><u>Name/Organization of Submission</u></b>
TFS-2001	Mr. Jonathan Lampe (Personal Views) Goodman & Goodman
TFS-2002	Mr. Edward Waitzer Ontario Securities Commission
TFS-2003	Mr. Philippe Tardif (Personal Views) Lang Michener
TFS-2004	Mr. J. Pearce Bunting The Toronto Stock Exchange
TFS-2005	Mr. Ralph T. Neville Mr. David A. Wilson The Institute of Chartered Accountants of Ontario
TFS-2006	Ms. Shelley P. Flynn Canada Trust
TFS-2007	Mr. Robert Yalden (Personal Views) Osler, Hoskin & Harcourt
TFS-2008	Mr. Douglas P. Thomas Investment Counsel Association of Ontario
TFS-2009	Mr. J. Charles Caty Investment Dealers Association of Canada
TFS-2010	Mr. D.S. McReynolds Davies, Ward & Beck
TFS-2011	Professor Jeffrey G. MacIntosh (Personal Views) Faculty of Law, University of Toronto
TFS-2012	Ms. Helen K. Sinclair Canadian Bankers Association

<b><u>File No.</u></b>	<b><u>Name/Organization of Submission</u></b>
TFS-2013	Mr. William Moull
TFS-2014	Mr. Philip Anisman
TFS-2015	Mr. G. Blair Cowper-Smith (Personal Views) McCarthy Tétrault
TFS-2016	Osler, Hoskin & Harcourt
TFS-2017	Professor Mary Condon (Personal Views) Professor John Evans (Personal Views) Osgoode Hall Law School, York University
TFS-2018	Smith, Lyons, Torrance, Stevenson & Mayer
TFS-2019	Ms. Frances M. Connelly The Toronto Society of Financial Analysts
TFS-2020	Stikeman, Elliott
TFS-2021	Mr. J.A. Barnes (Personal Views) Fraser & Beatty
TFS-2022	Ms. Anne E. MacLean, CFA Canadian Council of Financial Analysts
TFS-2023	Tory Tory DesLauriers & Binnington
TFS-2024	Mr. Rene Sorell (Personal Views) McCarthy, Tétrault
TFS-2025	Fasken Campbell Godfrey
TFS-2026	Mr. James C. Baillie, Q.C. (Personal Views) Tory Tory DesLauriers & Binnington
TFS-2027	Mr. David W. Drinkwater (Personal Views) Osler Renault

## **APPENDIX VII**

### **SUMMARY OF SUBMISSIONS - SECOND ROUND**



## PROVINCE OF ONTARIO TASK FORCE ON SECURITIES REGULATION

### SUMMARY OF SUBMISSIONS - SECOND ROUND

#### Mr. Philip Anisman

Mr. Anisman argued that the proposals in the Interim Report give the Ontario Securities Commission (the "Commission" or the "OSC") too much independence and flexibility and provide insufficient checks and balances. Specifically, he commented: "In result, the balance reflected in the Interim Report tilts towards independence and flexibility for the Commission at the expense of accountability and remedial avenues for those affected by action that the Commission might take. The Interim Report emphasizes procedures to be followed by the Commission which, while necessary and important to ensure openness, are not sufficient to provide accountability and checks against arbitrary action." (p.2)

**Rule-making Power.** With respect to the conferral of rule-making power upon the Commission, Mr. Anisman noted that: "[t]he scheme in the Interim Report ... is neither sufficient to confine the Commission's authority to make rules nor to ensure that there are adequate checks against arbitrary action by it. Rather, the recommended scheme would create a statutory framework within which the Commission would likely become a law unto itself, with power to define the scope of its own jurisdiction through the adoption of rules and, possibly, by other means." (p.4)

Specifically, he argued that the purposes and principles section proposed in the Interim Report is too general and would not be capable of "imposing limits on the Commission's authority, beyond a requirement that any rules adopted must relate to the securities and/or capital market or market participants in some way." (p.4-5)

Instead of using a purposes and principles clause as a constraint on the Commission's rule-making power, Mr. Anisman suggested that section 143 of the current Act be amended to give the Commission rule-making power in specifically enumerated areas. He argued that this is necessary to ensure that the "Commission does not become a law unto itself." (p.7)

Furthermore, Mr. Anisman argued that neither the notice and comment procedure nor the cabinet approval requirement provide adequate checks against the Commission exceeding its jurisdiction. Consequently, he recommended that the Act be amended to "ensure that regulations made by the Commission are subject to the traditional form of check provided by judicial review." (p.8) In addition, he suggested that the Act specify the appropriate standard of review in order to "avoid undue deference by the judiciary." (p.8).

Finally, Mr. Anisman was critical of the Task Force's proposal to grant co-extensive rule-making authority to the Cabinet. Instead, he suggested that the Cabinet only be

authorized to issue "directions to the Commission which would require it to initiate a rule-making proceeding."(p.9)

**Policies, Blanket Rulings and Memoranda of Understanding.** Mr. Anisman suggested that stronger checks and balances are required with respect to these instruments. First, he argued that policy statements should be subject to notice and comment and to judicial review on the basis of standards specified in the Act. Second, he noted that blanket rulings should be subject to all the procedures applicable to rule-making. Third, he suggested that memoranda of understanding ("MOU's") should be subject to Cabinet approval. He also noted that the power to enter memoranda of understanding should be limited to MOU's with other regulatory and self-regulatory organizations.

**Transitional Measures.** Mr. Anisman suggested that some transitional measure must be provided so as to enable the Commission to legitimate its existing policy instruments in accordance with the process for notice and comment established by the Task Force. He noted: "As I said in my initial submission, the Act should provide for a two-year period for a process of legitimation, which should ensure that all existing regulatory instruments that are to continue in effect would be subject to review by the cabinet and by a court." (p.15)

**Mr. James C. Baillie, Q.C., Tory Tory DesLauriers & Binnington (personal views)**

Mr. Baillie prefaced his comments by noting that in evaluating the recommendations of the Interim Report it is necessary to consider the proposed amendments currently before the Legislature which would expand the enforcement provisions of the Act.

After making this preliminary comment, Mr. Baillie then discussed the rule-making power suggested by the Task Force. Specifically, he noted that while he accepts that the Commission should have a rule-making power, he does not believe that the purposes and principles section sufficiently constrains the scope of such a power. He commented: "it is hard to imagine a rule the Commission might wish to adopt that could not shelter under one or more of the listed principles. ... Accordingly, I do not regard the purposes and principles proposal as adequate to delineate the scope of the rule making authority, although I feel it should form part of the new legislative pattern." (p.4) Instead, Mr. Baillie discussed the possibility of a series of negative constraints, delineating certain things the Commission should not be allowed to do by rule, and a series of positive constraints, delineating the parameters of the new rule-making power.

With respect to policy statements, Mr Baillie suggested that "the Task Force [should] consider putting forward recommendations for at least basic procedural requirements attendant on the adoption of policy statements." (p.7) Mr. Baillie also expressed disagreement with the Task Force's recommendation that blanket rulings be exempted from the procedural requirements of the new rule-making power. Furthermore, he suggested that the Task Force resolve any doubts respecting the Commission's authority to issue blanket rulings.

Mr. Baillie also commented on the question of access to the Commission for guidance. He noted that a review of the section 8 hearing process is insufficient. "I agree that the section 8 process needs review, but to my mind the real concern goes beyond section 8. That section is triggered only by a formal decision - a refusal of registration or of a prospectus receipt. In many or most situations that is far too late in the process to be useful. For example, a dispute over the application of the escrow guidelines to a high-tech IPO cannot be left for resolution at that late stage. What is needed is a process for a Commission hearing at the much earlier point when the issue arises." (p.9-10)

Finally, with respect to transitional arrangements, Mr. Baillie noted that he does not believe that any existing policy statements should be automatically anointed as rules. He does, however, believe that blanket orders and rulings should be grandfathered so that they continue to be legally effective under the new regime. He notes that "[t]his recommendation could be satisfied either through according them status as rules, or through an unambiguous confirmation of their validity as blanket rulings." (p.9)

#### **Mr. J.A. Barnes, Fraser & Beatty (personal views)**

Mr. Barnes expressed general support for the Interim Report. However, he made two suggestions for improvement. First, he noted, that the Commission has many unwritten or unannounced policies. He argued that this is inconsistent with the objectives of the Interim Report. Consequently, he suggested that the final version of the Report state that any "policy" promulgated internally by the Commission should be published externally.

Second, Mr. Barnes discussed the transitional period and noted that the "implementing legislation should clearly carry forward the idea that the [existing] policies can continue whatever level of authority they had before." (p.2)

#### **Mr. J. Pearce Bunting, The Toronto Stock Exchange (the "TSE")**

The TSE expressed strong support for the recommendations in the Interim Report, subject to the following comments.

First, the TSE expressed concern that the limitations on the Commission's rule-making power suggested in the interim report "are too general to be of any practical import. If the Commission is empowered to make rules 'in furtherance of the purposes and principles of the Act as defined in the statute', then the Legislature will have delegated to the tribunal the power to make any rule that reasonably relates to a regulatory purpose in securities markets. If such sweeping power to make rules is enacted, it is particularly important that the exercise of such authority be mitigated by control mechanisms such as judicial review and empowering the Cabinet to reject rules adopted by the Commission." (p.1)

Second, the TSE argued that, like rules, policy statements should be subject to mandatory notice and comment procedures.

**Mr. J. Charles Caty, Investment Dealers Association of Canada (the "IDA")**

The IDA expressed general support for both the foundational principles and the recommendations in the Interim Report. However, it also noted three areas of concern.

First, it expressed concern that the statutory power granted to Cabinet to disapprove or amend Commission rules would not be exercised openly. Specifically, it noted: "the nature of this power and the procedure through which it is exercised must be transparent in order to maintain a legitimate regulatory regime. Indeed, the Association recommends that the Cabinet's exercise of this power be subject to a notice and comment procedure prior to Cabinet invoking its veto power against an OSC rule. With respect to page 34 of the Interim Report, the Association recommends that, in the event that Cabinet opts for simple disapproval of an OSC rule, it be statutorily-entrenched that Cabinet be required to provide instructions to the OSC as to the issues of concern to Cabinet and the amendments necessary on matters requiring reconsideration before Cabinet assent may be obtained, and that these instructions be made public." (p.2-3)

Second, it suggested that the Task Force elaborate on transitional arrangements. It noted that "...there are some existing policy statements which have stood the test of time and which have maintained their currency through being the subject of ongoing comment. The Association recommends that the OSC should be empowered to elevate automatically such existing policy statements to rules, without having to go through a notice procedure." (p.3)

Finally, the IDA noted its support for a statutory purpose clause but suggested, with respect to the purposes and principles section found in the Interim Report, that "the principle expressed in paragraph 1(2)(c) is already subsumed within the overall purpose of the Act expressed in paragraph 1(1)(ii), and therefore should be deleted." (p.4)

**Professors Mary Condon & John Evans, Osgoode Hall Law School (personal views)**

Professors Condon and Evans noted that "[o]verall, we think that the Interim Report gets the main things right: a broad articulation of the statutory purposes, the grant of ample rule making power to the Commission, the retention (and legitimation) of the Commission's power to use informal regulatory instruments, and a series of measures designed to enhance links with, and accountability to, the Legislature." (p.1) However, Professors Condon and Evans also expressed several specific concerns regarding the proposals of the Interim Report.

First, they argued that "the Commission's role in promoting the efficiency of the operation of Ontario's capital market permeates the entire report, while its role as the protector of investors and of public confidence in the integrity of the market assumes a very secondary significance. The Report is evidently more concerned with the need to prevent the abuse of public power by the Commission than to give to the Commission the powers that it needs to protect the public from abuses of private power by members of the securities industry." (p.1)

Specifically, they noted that the proposed purposes and principles section leans too heavily towards achieving market efficiency purposes. "Only principle (b) (timely disclosure) seems clearly directed to investor protection, although even here we note that timely disclosure may also be regarded as enhancing market efficiency." (p.2) Professors Condon and Evans suggested that this imbalance be redressed by inserting additional principles such as:

- "(h) the need for effective and timely use of the enforcement powers provided in the Act; and
- (i) the need to take proactive measures to identify and fill gaps in the scheme of regulatory protection." (p.2)

Furthermore, they expressed concern with principle (d) noting that if it "implicitly favours judge made law over more comprehensive formulations by the Commission of regulatory policy, it may impose serious restrictions on the Commission's effectiveness in regulating the market in the interest of the public." (p.2)

With respect to principle (g), they expressed concern that it places too much emphasis on the avoidance of costs, appearing to give it the same level of importance as the statutory purposes. Consequently, they noted that if it is to be retained, it should be redrafted so that "it starts with something along the following lines:

- (g) the need to achieve the purposes of the Act while giving due consideration to business and regulatory costs ...." (p.3)

Second, Professors Condon and Evans expressed strong support for the Commission's public interest jurisdiction and noted that they disagreed with Professor MacIntosh's suggestion that it be eliminated. They argued that the public interest jurisdiction is vital to the timely protection of investors. Furthermore, they noted that policy statements play a very important role in the fulfilment by the Commission of its public interest jurisdiction. They agreed that in light of *Ainsley*, "there was probably no alternative to the recommendation to confer expressly a statutory power to issue policy statements and blanket rulings." (p.4). However, they noted that the Interim Report does not fully solve the *Ainsley* problem in that it does not sufficiently clarify when a policy statement is substantively a rule and should therefore be subject to the procedural requirements applicable to Commission rules. Consequently, Professors Condon and Evans noted: "the Task Force should suggest some statutory criteria for distinguishing between a rule and a policy statement. In our view, those identified by R.A. Blair J. in *Ainsley* are liable to prove too restrictive of the Commission's ability to use policy statements when they are required to deliver an effective regulatory response to a problem of investor protection." (p.5)

Third, with respect to the rule-making procedure specified in the Interim Report, Professors Condon and Evans commented that the Act "should not expressly provide that the Commission may hold public hearings, because this would expose the Commission to attack on

the ground that its decision not to hold a hearing in a given situation was unreasonable, or unfair." (p.6) Furthermore, they expressed some concern with the proposed Statement of Regulatory Rationale and Efficiency. Their concern was based on the belief that it will put too much emphasis on the anticipated economic impact of the proposed rule. "The problem, of course, is that while the latter [economic impact of the rule] can often be described with apparent precision, the benefits accruing from advancing the statutory purposes are frequently more diffuse, and less amenable to being reduced to 'hard numbers'." (p.6-7)

Fourth, Professors Condon and Evans suggested that while the Cabinet should be permitted to veto a Commission rule, it should not have the power to amend such a rule. As well, they disagreed with granting the Cabinet regulation-making power parallel to that of the Commission. They noted that if there ever is a serious need for such Cabinet action, it should be addressed "in the most public manner possible, that is, through the introduction of legislation." (p.7)

Finally, Professors Condon and Evans noted that there is concern about the process used by Government in making senior appointments. Specifically they noted that "the appointment process should be much more open, and designed in a way that will reassure a sceptical public that the best qualified people are appointed. It must be made quite clear that the search for appointees is not confined to the friends of the governing party, or to others who have traditionally been recruited for attractive public office." (p.8-9)

### **Mr. Frances M. Connelly, The Toronto Society of Financial Analysts**

The Toronto Society of Financial Analysts (the "TSFA") expressed general agreement with the proposals of the Task Force. It noted that "an effective securities regulatory system requires that a specialist agency like the Commission have the broadest possible range of regulatory instruments available to it and that it be vested with rule-making authority." (p.1) Furthermore, the TSFA expressed support for the Commission's rule-making power being based on a purposes and principles section and not on "the narrowly defined section 143 which would not support many of the policies currently in place." (p.1)

With respect to the proposed notice and comment procedure for rules, the TSFA questioned why they would not also apply to policy statements.

Finally, the TSFA expressed support for the Annual Statement of Priorities and the Regulatory Status Report, but suggested that the Task Force consider "a more frequent report of status (perhaps quarterly and to be published in the Bulletin), that would confirm any recent developments (or non-developments)." (p.2)

**Mr. G. Blair Cowper-Smith, McCarthy Tétrault (personal views)**

Mr. Cowper-Smith expressed support for the use of a statutory purpose and principles clause to create a framework for the development of policy statements and rules. He noted:

"Your approach is innovative. The solution that might well have been expected would have been the development of a long laundry list of items supplementing existing section 143. Under the laundry list approach, it would be necessary to find appropriate wording in section 143 to justify Policy Statements or Ruling initiatives. Under the approach you are proposing, the Commission would have to consider broader issues in developing policy. I think your approach is attractive and preferable. The laundry list approach means little consideration will have to be given to the proper audit of securities regulation in enacting Rules and Notices." (p.1-2)

With respect to other matters, Mr. Cowper-Smith noted that Policy Statements should also be subjected to a notice and comment process, although the process and the comment period should be different from that associated with the enactment of rules.

**Davies, Ward & Beck**

Davies, Ward & Beck expressed agreement with the general thrust of the Interim Report. Specifically, it noted its agreement with the use of a broad purposes and principles clause as the basis of the conferral of rule-making authority on the Commission. However, it suggested that the nexus between the 'purpose clause' and any specific rule should be closer than that provided in the Interim Report. It noted: "...we question whether the requirement that the Commission rules be 'in furtherance of' the purposes and principles establishes a sufficiently close connection between the rule-making power and the purpose clause. An alternative formulation that might address our concern would be to provide that any rules enacted must be 'in accordance with' the purposes and principles of the Act." (p.3) It also referred to their First Round submission which proposed that the "Commission be permitted to enact rules that were 'necessary, in the opinion of the Commission, in order to implement the purposes of the statute.'" (p.3)

Davies, Ward & Beck also stated: "Given the flexibility of the language of the proposed section, we believe it is appropriate that the Commission be required to 'adhere' to the principles. This places an onus on the Commission to show that the exercise of any of its discretionary powers is consistent with the principles that are enunciated." (p.2)

Finally, Davies, Ward & Beck stressed the importance of adequate Notice and Comment procedures to its support of a broad rule-making power. It noted: "[i]n the event that the Notice and Comment procedure proposed by the Task Force were modified so as to dilute

its requirements, our views on the acceptability of a general rule-making power might well be different." (p.2)

**Mr. David W. Drinkwater, Osler Renault (personal views)**

Mr. Drinkwater began by noting that for the most part he endorsed the recommendations of the Interim Report. However, he added that the Final Report should adopt the suggestions made by the Ontario Securities Commission. Furthermore, he expressed concern that the Interim Report did not sufficiently stress the importance of the independence of the Commission.

Mr. Drinkwater also noted that there is difficulty achieving timely statutory reform of securities legislation. Consequently, he suggested that "it would ... be useful to specifically provide that there be reports by the Commission to the Government every five years analyzing the previous period and recommending changes. It would be specifically contemplated that after consideration these changes would be put in place similar to the ten year review of the Bank Act." (p.1-2)

Finally, he argued that "the timeframe for transitional arrangements is much greater than people anticipate." (p.2) He believes that there must be a significant period of time, probably in the neighbourhood of three to five years, for transitional arrangements. He noted that "[t]his is particularly appropriate given that the implications for integrating the recommendations of the task force on a national basis are somewhat complicated and if not effectively done, could further complicate the ability to effectively sustain the provincial securities system." (p.2)

**Fasken Campbell Godfrey**

Fasken Campbell Godfrey ("Faskens") expressed general support for the conferral of rule making authority upon the Commission. However, it identified several issues of concern with respect to this authority.

First, Faskens suggested that the rule-making power should not be based on a broad purposes clause but should instead be "limited to specifically enumerated areas, being those subject matters in respect of which the legislature determines that the Commission ought to be competent to make rules." (p.2-3) In other words, it recommended basing the rule making authority on a section similar to the present section 143 of the Act.

Second, Faskens suggested that "Commission-made rules should be expressly subordinate to, and derivative from, the Act and the Regulations" (p.3)

Third, with respect to the ability of the Commission to bypass the notice and comment procedure in enacting interim rules when faced with matters of extreme urgency, Faskens argued that such situations would be rare and that therefore no such power should be

given to the Commission. Instead, it suggested that Cabinet should deal with such rare situations. Faskens also expressed concern with the *de minimis* exception to the notice and comment procedure, suggesting that the notice and comment procedure should apply to administrative and procedural rules.

Fourth, Faskens concurred "in the Task Force's conclusion that there should be no special transitional arrangements concerning existing policy statement which would have the effect of elevating some of such policy statements to the status of Commission-made rules without the benefit of the comment and notice procedure recommended in the Interim Report." (p.5)

Fifth, with respect to the publication by the Commission of summaries of comments received from the public, Faskens suggested that the content of the summary should be prepared by the person making the submission. This could be accomplished by requiring all submissions to be accompanied by a summary that satisfies certain word limits.

Finally, Faskens suggested that the Commission's power to enter MOU's should be limited to those matters which are within the competence of the Commission and be subject to the notice and comment procedures and the Cabinet disapproval procedure applicable to rule-making.

#### **Ms. Shelley P. Flynn, Canada Trust**

Canada Trust began by strongly encouraging "the creation of a national commission or alternatively, the use of the designated jurisdiction approach to define a lead regulator, supported by interjurisdictional information sharing agreements." (p.1)

With respect to the Interim Report, Canada Trust expressed disapproval of any conferral of rule-making authority upon the Commission. However, it noted that if rule-making power is granted, the recommended notice and comment process should be invoked. With respect to policy statements, Canada Trust supported granting the Commission authority to promulgate policy statements, provided that policy statements are not given the force of law and are not so "applied" by the Commission.

With respect to blanket rulings, Canada Trust noted that it would support the use of this instrument "provided that there is statutory power afforded to the Commission to make such rulings, the decision is subject to an appeal process and that the blanket rulings are used in a context that interprets the law as opposed to making new law." (p.3)

Finally, Canada Trust noted that it "support[ed] the Task Force's recommendation that the Commission review the operation of the section 8 hearing process to ensure that parties are able to secure expeditious access to the Commission in the event of a disagreement with staff in respect of certain interpretation or applications of the Act." (p.3)

**Mr. Jonathan Lampe, Goodman & Goodman (personal views)**

Mr. Lampe suggested several changes to the text of the proposed purposes and principles section and included a revised purposes and principles section in his submission. Included among his suggested changes were:

- (1) "an amendment of paragraph 1(1)(a) to indicate that an 'appropriate degree' of protection should be afforded, rather than an 'adequate level'." (p.1); and
- (2) the combining of subsections 1(2) and 1(3) and the addition of new introductory language which requires the Commission to "discharge its statutory duties and obligations and exercise its discretionary powers in a manner consistent with the purposes of the Act" and to "take into account" the enumerated principles in so doing. (p.3)

In addition to the changes outlined above, and others reflected in his revised draft, Mr. Lampe indicated that there is room for further refinement of the principles contained in subsection 1(2) and that this would encompass "some additional, general regulatory goals that could be identified through further discussion with staff of the Commission. Some consideration might also be given to language that clearly indicates that these principles, while fundamental, are obviously not exhaustive." (p.2)

**Professor Jeffrey G. MacIntosh, Faculty of Law, University of Toronto (personal views)**

Professor MacIntosh expressed two principal concerns with the Interim Report. First, he noted that the Report does not adequately address the rule of law concerns raised by *Ainsley*, in that it continues to allow the Commission to issue policy statements that will be applied in a rule-like manner. In fact, he noted that the Interim Report encourages continued reliance by the Commission on policy statements by providing no transitional method of converting existing policy statements into rules and by suggesting that the Commission continue to use policy statements until such time as their thinking on an issue has been sufficiently crystallized. In addition, he noted that the Task Force will not even apply the mandatory notice and comment procedure to the promulgation of policy statements.

Professor MacIntosh's second fundamental concern related to the use of a purposes and principles section to constrain the scope of the rule making power. He noted: "[i]n general, the grant of rule-making authority might be specific (as in s.143 of the existing Act), or keyed to the sort of "purposes" and "principle" clauses recommended by the Task Force. In my view, the former technique is preferable to the latter. As I stated in my earlier comment (and as noted in the Task Force Report) there is a danger that broad general words indicating the purposes of the legislation will not act as an effective constraint on the rule making power. The danger is that courts will defer to the Commission's construction of these general words, much as they have deferred to the Commission's construction of "the public interest" in many past cases. If this is

so, then the Commission will have been given a rule-making power without effective boundaries." (p.3)

Professor MacIntosh concluded: "[i]n the end, I am concerned about the signal which the massive expansion of regulatory power advocated by the report of the Task Force might send to the regulators. As the staff itself has indicated in a report prepared for the Task Force, many of the policy statements could not be justified as regulations. However, the Commission will be rewarded for its jurisdictional overreaching not by having its powers curtailed, but by having them greatly expanded. I cannot help worrying about the incentives that this creates for future conduct." (p.5)

Finally, Professor MacIntosh added that he is concerned over the shortness of the timetable employed by the Task Force. He noted that given the importance of the task at hand, public hearings should have been held.

#### **Ms. Anne E. MacLean, Canadian Council of Financial Analysts**

The Canadian Council of Financial Analysts (the "CCFA") stressed that "it is important that the Commission have the ability to effectively regulate the marketplace. Allowing the Commission the capacity to make binding rules is a major, and probably necessary, initiative for securities regulations in Ontario." (p.2) However, the CCFA added that the "the purpose and function of these binding rules versus other regulatory instruments must be clearly defined." (p.2)

The CCFA also commented on the importance of coupling any rule-making power with a strong and responsive system of checks and balances.

With respect to policy statements, the CCFA noted that the notice and comment procedures are reasonable but that wider dissemination to interested parties would be helpful.

Finally, the CCFA expressed its support for "a national securities commission or, at least, a national representation of the existing securities commissions." (p.1)

#### **Mr. William D. Moull**

Mr. Moull expressed general approval for the Interim Report. He did, however, make several suggestions for improvement. First, he suggested that the concept of public interest should appear somewhere in the purposes and principles section, "since that is the touch-stone of everything the Commission does in formulating and enforcing policies for Ontario's securities market-place." (p.1)

He also expressed some concern with the Commission being permitted to enact binding rules and then serving as the sole adjudicator of those rules. He noted that some "splitting of the legislative and adjudicative functions in the new structure might help to enhance

the accountability of the regulatory system by having someone other than the authors of a binding rule decide when and how it should apply." (p.2)

Finally, he noted that the Task Force should consider whether the Act should subject the Government to notice and comment requirements when making regulations in the securities field.

#### **Mr. R.T. Neville and Mr. D.A. Wilson, The Institute of Chartered Accountants of Ontario**

The Institute of Chartered Accountants of Ontario expressed general approval for the Interim Report. They noted: "The Institute of Chartered Accountants of Ontario appreciates the manner in which our recommendations have been addressed in your interim report. ... We urge you to incorporate these interim recommendations in your final report to the Minister." (p.1-2)

#### **Ontario Securities Commission**

The Commission made several recommendations with respect to the Interim Report:

- (1) **Transitional Arrangements.** The OSC expressed concern over the need for transitional arrangements. They noted that it is important that certain existing policy statements, listed in Appendix A to their submission, be permitted to automatically become rules at the time the OSC is granted rule-making authority. In the alternative, they argued that at the very least such policy statements should be "deemed to be rules for a fixed period of three years at the time Ontario establishes the rule-making recommendations." (p.3)

Furthermore, with respect to existing regulations, the OSC suggested that "on the coming into effect of the legislative amendments, all of the currently effective regulations, except those made pursuant to paragraph 143(15) of the Act (those relating to fees), [should] be deemed to be rules duly made by the Commission and continued in effect as such, while those made pursuant to paragraph 143(15) [should] be continued in effect as regulations." (p.3)

Finally, the OSC recommended that existing blanket orders/rulings should be preserved as effective orders/rulings.

- (2) **Flexibility.** The OSC recommended that the Act "be amended to provide that the OSC may make rules that impose requirements that are greater, lesser or different than those otherwise applicable under the Act."(p.4)
- (3) **Blanket Orders/Rulings.** The OSC noted that blanket orders/rulings have often been used for purposes of regulatory efficiency in circumstances "[w]here an

order/ruling has been granted in a number of similar situations, so that the policy considerations have been sufficiently canvassed and the policy determined." (p.5) The recommended that it be permitted to continue "this use of blanket orders/rulings without a requirement to go through the notice and comment process required for rule-making." (p.5)

- (4) **Agreements and Memoranda of Understanding.** The OSC suggested that the language of the Interim Report be broadened so as to allow it to enter into agreements and memoranda of understanding with "market participants" instead of just with "registrants."
- (5) **Purposes and Principles of the Securities Act.** The OSC noted that some principles may conflict or be irrelevant in a given rule-making situation. Consequently, it recommended that the principles be viewed only "as factors to be taken into consideration in connection with a proposed rule, to the extent relevant." (p.5) In addition, it made several suggested modifications to the language of the principles section and recommended that "the list of factors not be drafted as exhaustive." (p.6) Finally, it expressed concern "that the desirability of obligatory 'principles' in the context of an administrative proceeding regarding an individual case or a quasi-judicial function may be somewhat different than in the rule-making context." (p.6)
- (6) **Notice and Comment and Cabinet Review of Commission Rules.** The OSC recommended that the initial notice and comment period be reduced to 60 days, that the Cabinet approval period be reduced to 45 days, and that the 15 day pre-effective period be triggered by publication in the OSC Bulletin, not the Ontario Gazette.
- (7) **Statement of Regulatory Rationale and Efficiency.** The OSC noted that: "to the extent that there is a requirement to discuss how a proposed rule accords with the stated purposes and principles of the Act, it may not be necessary to also include a description of the statutory power relied upon." (p.7) Furthermore, it questioned the utility of the economic impact statement, particularly in light of the cost of preparing it. Finally, it noted that: "rather than be obliged to discuss alternatives that were considered and rejected in respect of a proposed rule, we are of the view that it would be more useful to include a description of the reasons why and how a particular objective is being furthered by a proposed rule." (p.7-8)
- (8) **Staff Summation and Commissioners Reply.** The OSC suggested that the Staff Summation and Commissioners Reply should only relate to material issues and concerns and should be from the OSC, not the Commissioners *per se*.
- (9) **Annual Regulatory Status Report and Annual Statement of Priorities.** The OSC recommended that these documents be included in their annual report.

Furthermore, it suggested that the entertaining of submissions regarding current regulatory instruments should not be a formal process (such as an annual request for submissions). Finally, it argued that the Regulatory Status Report should only discuss significant comments formally communicated during the previous 12 months.

- (10) **Waiver for Exceptional Circumstances.** The OSC suggested that interim rules be valid for a period longer than 6 months, so as to ensure that there is sufficient time to put in place a permanent rule. Furthermore, it suggested that the threshold for waiver of the notice and comment period should be lowered from "irreparable harm" to "risk of material harm."
- (11) **Staff Summation of Comments.** The OSC recommended that it should have the "authority to determine on a case-by-case basis whether or not it can grant confidentiality if requested by a commentator, subject to the Freedom of Information Act." (p.10)
- (12) **Legislative Support.** The OSC suggested that there be a statutory requirement for a regular review of the Act.
- (13) **Resource Issues.** The OSC stated: "The report does note that additional resources will be required. However, we are concerned that it does not focus sufficiently on the nature and extent of additional resources that will be necessary to implement the recommendations of the Task Force. We recommend that the Task Force highlight in its final report those recommendations in respect of which additional resources will be required." (p.10)

### Osler, Hoskin & Harcourt

Osler, Hoskin & Harcourt ("Oslers") noted that rule-making power may be appropriate in light of *Ainsley*. However, it expressed concern that "appropriate safeguards be built into any rule-making process so as to ensure that the OSC respects the legislature's intent as expressed both in the *Securities Act* (Ontario) and in corporate law statutes." (p.1) In this respect, Oslers supported the Task Force's efforts to establish mandatory public consultation mechanisms before a rule can become effective.

Oslers also noted that if rule-making power is given to the Commission it is important that the Commission's mandate be clearly defined. Oslers therefore noted that it "believe[d] that a purposes and principles section that clearly defines the OSC's mandate is a critical limitation to any rule-making power and should therefore be included in the *Securities Act* (Ontario)." (p.2) However, it added that in its view the "mandate set out in the Report is too broadly framed" and that it was "inappropriate to enact so fundamental an amendment to the Act absent a detailed review of the purpose of the *Securities Act* (Ontario)." (p.2)

**Ms. Helen K. Sinclair, Canadian Bankers Association**

The Canadian Bankers Association (the "CBA") noted that it believes the Interim Report represents a significant contribution to the evolution of securities regulation. However, it proposed the following revisions and additions to the recommendations in the Interim Report:

- (1) The notice and comment provisions (including the requirements for Statements of Regulatory Rationale and Efficacy, Summations of Public Comments, and Commissioners' Replies) should also apply to policy statements, blanket rulings and memoranda of understanding.
- (2) The scope of blanket rulings should not be restricted to registration and prospectus requirements.
- (3) An expedited process for Commission review should be implemented. The CBA noted that in its opinion parties are not currently able to secure expedited access to the Commission when they disagree with staff with respect to certain interpretations or applications of the Act.
- (4) The power to disapprove Commission rules should be vested in the Minister of Finance, rather than the Cabinet as a whole.
- (5) As part of the Statement of Regulatory Rationale and Efficacy, the proposed description of the anticipated economic impact of a policy instrument should be in the form of a cost-benefit analysis. Furthermore, the Task Force should consider "whether it is practicable for the Commission to undertake a quantitative analysis of the economic impact of a policy statement." (p.5)
- (6) "[T]he Commission [should] be permitted to waive compliance with the notice and comment procedure with respect to a proposed interim rule only where the proposed interim rule has been explicitly approved by the entity which enjoys disapproval power with respect to Commission rules generally. This entity should, pursuant to the CBA's recommendation regarding item 4 above, be the Minister of Finance rather than the Cabinet." (p.6)
- (7) Request for Proposals should be circulated by the Commission "to interested parties, after the release of the Annual Statement of Priorities, in order to obtain input regarding the severity of, and alternative solutions to, perceived problems at an early stage of the development process." (p.7)
- (8) The process of preparing the Annual Regulatory Status Report should include a close examination and review of residual instruments which remain in draft form.

- (9) Exemptions granted pursuant to policy statements should be published "in cases where the exemption reflects a significant change from the published policy or previous practice. In addition, we [the CBA] recommend that exemptions granted with respect to Commission rules [should] be published." (p.9)

Finally, the CBA recommended that "the final report include an estimate of the additional staff resources that would be expended in complying with the documentation obligations proposed in the Interim Report." (p.9)

#### **Smith, Lyons, Torrance, Stevenson & Mayer**

Smith, Lyons, Torrance, Stevenson & Mayer expressed general support for the Task Force's recommendations. However, it also made several suggestions for improvement. First, it noted that while the Commission should have access to a broad range of policy instruments, these should not include instruments such as speeches which are not always published and to which market participants do not have equal access.

Second, it noted that "it is important for Commission staff to be available to discuss issues with market participants on an informal and timely basis without a need to submit a formal application or make written submissions. We suggest that the Task Force consider devising a mechanism whereby market participants are given adequate access to staff on a timely basis and are given the ability to appeal staff interpretations to management on a timely basis before invoking the section 8 hearing process."(p.2)

Finally, it noted that while a majority of its securities group concurred with the conferral of rule-making authority on the Commission, there was a minority who opposed this recommendation. Nonetheless, there was agreement that public participation in the rule making process is important and that rules should be drafted with the "same discipline and specificity as other forms of legislation" (p.2), not in the vague and broad manner currently associated with policy statements.

#### **Mr. Rene Sorell, McCarthy Tétrault (personal views)**

Mr. Sorell stated that in general the recommendations of the Task Force appear to be worthwhile. However, he expressed some concern about the "purposes and principles" section. First, he noted that the purposes may be somewhat controversial. Particularly, he noted that "the purpose of fostering 'fair and efficient capital markets in Ontario and confidence in such markets' seems to be hard to relate to the actual language of the statute and regulations." (p.1-2) He added that "[e]ven if the purposes in subsection 1(1) were not controversial, the language of subsection 1(2) and 1(3) would be difficult to interpret." (p.2) Finally, he suggested that the purposes and principles section might work better if it related solely to the Commission's rule-making power instead of being a statement about the statute in its entirety.

Mr. Sorell also suggested that the Cabinet's power to disapprove of Commission rules should be further refined "by prescribing a procedure which parties would have to follow to bring to the attention of Cabinet reasons for disapproving Rules adopted by the Commission." (p.3)

With respect to policy statements, Mr. Sorell suggested that the statutory notice and comment procedure should apply to these instruments as well.

Finally, Mr. Sorell addressed the question of the ability of parties to secure expeditious access to the Commission. He argued that the section 8 procedure for so doing is less than ideal. He noted that a "procedure which would be preferable would be to afford a party an opportunity to go directly to the Commission when it appears that staff will be opposing the granting of the relief they seek." (p.3)

### **Stikeman, Elliott**

Stikeman, Elliott expressed broad support for the approach adopted in the Interim Report and endorsed the granting of rule-making authority to the Commission. It also expressed support for the Task Force's proposal that such rule-making authority be founded on an articulation of general principles and specific regulatory objectives. However, it expressed some "reservations with relying solely on statements of regulatory objectives (however carefully crafted) to constrain Commission rule-making activities." (p.2) Therefore it concluded: "while we believe that an express enumeration of principles and objectives would be desirable, it would also be desirable to enumerate, likely more generally than is currently the case in Section 143, areas of rule-making competence to ensure that Commission rule-making activities do not extend into entirely new areas without the benefit of positive, rather than merely negative, legislative sanction." (p.2)

Stikeman, Elliott expressed general agreement with the Task Force's recommendation that special transitional rules should not be adopted for the promotion of policy statements to rules without review or public comment. However, it added: "[w]e also recognize that there are certain policy statements (e.g. such as National Policies Nos. 44, 45 and 47, creating the POP, MJDS and the Shelf Prospectus systems) that are drafted as specific rules and not as statements of general policy. Accordingly, we recognize that in light of the extensive and recent public comment and review process carried out in respect of these policy statements, promotion to the status of rules without further public comment may be justified in such exceptional cases." (p. 2-3)

Stikeman, Elliott also expressed concern over the extent of sanctions available to the Commission to enforce its rules. It noted: "[w]e believe that this area deserves close attention as many of the concerns of commentators about the Commission becoming "a law unto itself" may be rooted in a justifiable fear that the use of penal sanctions to enforce compliance with Commission adopted rules may be going well beyond what is necessary to effectively regulate the capital markets." (p. 3)

Stikeman, Elliott reiterated a suggestion made in its earlier submission that Commission rules should be subject to a sunset provision under which such rules would become ineffective if not promoted to the status of regulation or legislation within a certain period of time.

Finally, Stikeman, Elliott considered the role of the Commission in granting exemptions from Commission rules, suggesting that the decision-making authority to grant such exemptions should be given at first instance to the Director of the appropriate branch, subject to a review on a *de novo* basis by the Commission at the request of the applicant. It also noted that there should be an expedited way to seek relief from the Commission when staff is not supportive of an application for relief. For example, it suggested having "the application reviewed and heard by a single Commissioner on an expedited basis ... The Commissioner would be entitled to require that the question be submitted to a panel of Commissioners for a more formal hearing if it became evident that significant or controverted factual questions were involved. Where the Commissioner renders its decision, however, we believe that such a decision should have the same force as if granted by a full panel of the Commission." (p.5)

**Mr. Philippe Tardif, Lang Michener (personal views)**

Mr. Tardif raised three principal issues of concern with respect to the Interim Report. First, he noted that "market participants would benefit from clearer regulatory guidance with respect to the extraterritorial (i.e. outside Canada) application of the Act in respect of 'trades' and 'distributions'." (p.1) Mr. Tardif asked whether it would be most appropriate for such an issue to be addressed by rule or by legislation. He noted that if legislation were the appropriate route, the rule making power granted to the Commission must be appropriately constrained.

Second, Mr. Tardif asked the Task Force to consider permitting the Cabinet to extend the disapproval period by an additional 60 days provided notice to this effect is given during the initial 60 day disapproval period.

Finally, Mr. Tardif expressed concern with the proposed *de minimis* exemption from the notice and comment procedure. He noted: "[i]t may be more expedient in most cases for the Commission to simply invoke the notice and comment procedure rather than be subject to scrutiny (following the adoption of a rule) with respect to its determination that the matter was not in the broad public interest." (p.2)

**Mr. Douglas P. Thomas, Investment Counsel Association of Ontario**

The Investment Counsel Association of Ontario expressed general support for the recommendations of the Task Force. It then reiterated the importance it placed on the following two issues: "(a) that the number and complexity of regulations affecting our industry be kept to a minimum and that they do not become a costly and confusing burden to our members, [and] (b) that there be appropriate checks and balances to ensure the proper accountability of the

Commission" (p.1) It concluded that it appeared that these issues had been adequately addressed in the Interim Report.

### **Tory Tory DesLauriers & Binnington**

Tory Tory DesLauriers & Binnington ("Torys") expressed general support for the Task Force's recommendations, while noting several specific concerns. First, it suggested that the Task Force should consider whether "specific consultative procedures should also be articulated for the implementation by the Commission of policy statements and the other policy making instruments identified in the Report." (p.1)

Second, it noted that the rule-making power conferred upon the Commission should not extend to permit the Commission to make rules which are inconsistent with the Act.

Third, Torys stressed the importance an "effective administrative procedure for bringing matters before a panel of Commissioners in an expeditious, informal and non-public manner, subject always to the discretion of the Commission to conclude that a particular matter cannot appropriately be dealt with in that way." (p.2) Furthermore, it suggested that the matters so brought before a panel of Commissioners should not be limited to interpretations of the Act itself, but should include interpretations of subordinate instruments such as policy statements. It noted that the Task Force's recommendation that the Commission review the operation of the section 8 hearing is insufficient to this end.

With respect to the Annual Statement of Priorities, Torys suggested that although it is both appropriate and necessary for the Commission to prepare and communicate its priorities, the making of such a report should not be statutorily required. Torys did, however, believe that "it is appropriate to require the circulation on an annual basis of a regulatory status report and that the Chair of the Commission should be required to present an annual report to a standing committee of the Legislature." (p.3)

With respect to the purposes and principles section, Torys noted: "[i]n general, we do not subscribe to the view that an articulation of broad principles is useful or effective in circumscribing the broad discretion granted or to be granted to the Commission under the *Securities Act*. In our view the principles enunciated are not sufficiently focused to lead one to conclude that they are necessary to ensure that the Commission will regulate within its proper bounds. ... If we were to comment on the specific principles proposed, we would recommend that principles 1(2)(d) and (f) be eliminated." (p.3-4)

Finally, Torys noted that it agreed with the Interim Report's conclusion that specific transitional rules are not necessary.

**Mr. Robert Yalden, Osler, Hoskin & Harcourt (personal views)**

Mr. Yalden expressed support for the granting of rule-making power to the Commission. However, he expressed concern that public comment may be limited to consideration of draft rules proposed by the Commission. He argued that consultation should take place at an earlier stage. Specifically, he suggested that the Task Force "formulate a mechanism whereby the OSC would invite suggestions regarding the most appropriate way in which to address a problem, prior to releasing a fully developed draft rule." (p.3) Additionally, he suggested that there be a mechanism whereby members of the public could raise a problem for public discussion. Mr. Yalden noted that such a process could be the submission, by members of the public, of draft rules to the Commission for discussion.

Mr. Yalden also noted that: "[t]he OSC should make a point of engaging in, and being seen to engage in, public dialogue with respect to the formulation of policy statements and not just with respect to the formulation of rules."(p.1) Furthermore, he noted that "[t]here should be a clear statutory expression of the purpose of rules that would be designed to ensure that the OSC does not avoid the proposed notice and comment process when establishing new principles governing securities related activity."(p.2)

With respect to the transition from policy statements to rules, Mr. Yalden suggested that "[t]here should be a mechanism whereby prompt analysis could begin with respect to the question [of] what policy statements should be converted into rules." (p.2)

Finally, he suggested alternative wording for principle 1(2)(d) so that it requires the Commission to exhibit "due regard for the intent, integrity and operation of other statutes and regulations governing business organizations and affecting capital markets and capital market participants." (p.7)







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